84-1905

No. 84-1905

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether provisions of the Social Security Act in effect between 1979 and 1983 that authorized payment of benefits to surviving widowed spouses, but not surviving divorced spouses, who remarried after age 60 violate the equal protection component of the Due Process Clause of the Fifth Amendment.

2. Whether, in this action for judicial review pursuant to Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), the district court properly certified a nationwide class that includes persons who did not exhaust their administrative remedies or who received a final decision of the Secretary denying their claims more than 60 days prior to the filing of this action.

PARTIES TO THE PROCEEDINGS

The appellant is Margaret M. Heckler, the Secretary of Health and Human Services.

The named appellees are Buenta M. Owens and Kenneth R. Owens. The district court certified a class, represented by those named appellees, consisting of (App., *infra*, 31a):

> [A]ll persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivor's benefits, as surviving divorced spouses, for any month after December, 1978, *provided* that such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982.

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The December 23, 1983 order of the district court granting the Secretary's motion for summary judgment (App., *infra*, 1a-12a) and the August 28, 1984 order of the district court certifying the class (App., *infra*, 13a-28a) are unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (App., *infra*, 30a-43a) also is unreported.

JURISDICTION

The judgment of the district court (App., *infra*, 44a-46a) was entered on December 20, 1984, and the order of the district court denying the Secretary's motion to alter or amend the judgment was entered on February 6, 1984 (App., *infra*, 47a). A notice of direct appeal to this Court was filed on March 7, 1985 (App., *infra*, 48a), and an amended notice of appeal was filed on March 8, 1985 (App., *infra*, 49a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the appeal to and including June 5, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment and Sections 202(e)(1)(A), (e)(4), and (f)(1)(A) and (5), and 205(g) of the Social Security Act are reproduced at App., *infra*, 54a-57a.

STATEMENT

The Social Security Act was amended, effective January 1979, to permit a surviving *widowed* spouse who remarries after age 60 to receive monthly survivor's benefits based on the deceased spouse's earnings account. However, until January 1984, a surviving *divorced* spouse who remarries was not entitled to receive survivor's benefits based on the former spouse's account. The district court held that this distinction in effect from 1979 through 1983 was irrational and therefore violated the Due Process Clause of the Fifth Amendment, and it ordered relief in this action under 42 U.S.C. 405(g) to a nationwide class that includes individuals who did not exhaust their administrative remedies or seek judicial review within 60 days of receiving the final decision of the Secretary.

A. The Statutory and Regulatory Framework

1. Substantive Provisions

The statutory provisions at issue in this action were the product of a step-by-step evolution of provisions for survivor's benefits for spouses and former spouses under the Social Security Act.

a. The Social Security Act, as enacted in 1935, provided only primary benefits for qualified wage earners. Ch. 531, §§ 201 *et seq.*, 49 Stat. 622 *et seq.* In 1939, Section 202 of the Act was amended to provide secondary benefits for wives, dependent children, widows and surviving dependent parents. Ch. 666, § 202, 53 Stat. 1363. The purpose of these amendments was to afford more adequate protection to the wage earner's family as a unit by furnishing benefits to family members who may have been dependent upon him. H.R. Rep. 728, 76th Cong., 1st Sess. 7 (1939); S. Rep. 734, 76th Cong., 1st Sess. 7-9, 11 (1939). See *Califano* v. *Jobst*,

434 U.S. 47, 52 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 208-209, 213 (1977) (opinion of Brennan, J.). The Act as so amended provided that widows and other secondary beneficiaries would lose their entitlement to monthly benefits if they remarried. § 202(e)(1)(A), 53 Stat. 1365; see also § 202(c)(1) and (f)(1), 53 Stat. 1364, 1366. In 1950, Congress added Section 202(f) to the Act to provide survivor's benefits for widowers. Ch. 809, § 101(a), 64 Stat. 482.[1] As in the case of widows, widowers lost their entitlement to benefits upon remarriage. 64 Stat. 485 (§ 202(f)(1)(A). In 1958, however, Congress enacted an exception to this remarriage rule, providing that if a widow or widower married an individual who also was entitled to receive secondary benefits under the Act, he or she would not lose the entitlement to survivor's benefits. § 202(e)(4)(A) and (f)(4) of the Act, as added by Pub. L. No. 85-840, § 307(b) and (c), 72 Stat. 1031. Compare *Califano* v. *Jobst*, 434 U.S. 47, 51 (1977).

b. In 1965, Congress amended Section 202(b) and (e) to permit a surviving divorced wife aged 60 or over to receive widow's benefits. However, unlike in the case of a widow, a surviving divorced wife could receive widow's benefits only if she had received support from the deceased wage earner and had been married to him for at least 20 years. Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376-377. See also § 216(d) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377-378.[2] As under the preexisting rule affecting widows, Congress provided that a surviving divorced wife could not receive widow's benefits if she remarried, unless she married a man receiving secondary benefits as a dependent widower or parent or as a disabled child aged 18 or over. § 202(e)(3)(A), as amended and renumbered by Pub. L. No.

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[1] A widower was entitled to receive benefits only if he had previously received one-half of his support from his wife. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), this Court held that the requirement that widowers, but now widows, show such support unconstitutionally discriminated on the basis of sex. Congress thereafter repealed the dependency requirement for widowers. Pub. L. No. 95-216, § 334(d)(1), 91 Stat. 1545; 42 U.S.C. 402(f)(1). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 2.

[2] Congress similarly amended Section 202(b) of the Act to make a divorced wife eligible for wife's benefits, subject to the same durational and support limitations. Pub. L. No. 89-97, § 308(a), 79 Stat. 375-376.

89-97, § 308(b)(2), 79 Stat. 377.[3] But at the same time, Congress relaxed the remarriage rule as it applied to widows and widowers. Congress provided that if a widow or widower, after reaching age 60, married an individual who was not entitled to benefits under the Act, he or she would not lose the entitlement to benefits, although the benefits would be reduced to 50% of the primary wage earner's benefit. § 202(e)(4) and (f)(5) of the Act, as added by Pub. L. No. 89-97, § 333(a)(1) and (b)(1), 79 Stat. 403 and 404.[4] The requirement that the surviving divorced wife establish that she was supported by the deceased wage earner in order to receive widow's benefits subsequently was eliminated in 1972. Pub. L. No. 92-603, § 114(b)(1), 86 Stat. 1348. See *Califano* v. *Boles*, 443 U.S. 282, 291-293 (1979).

c. In 1977, Congress again amended the relevant provisions of the Social Security Act. It revised Section 202(e)(4) and (f)(5) of the Act to provide that, if a widow or widower remarries after attaining age 60, the marriage will be "deemed not to have occurred" for purposes of entitlement to survivor's benefits. Pub. L. No. 95-216, § 336(a)(3) and (b)(3), 91 Stat. 1547. This amendment was effective for monthly benefits payable beginning in January 1979. § 336(c)(1), 91 Stat. 1547. As a result, since 1979, a widow or widower has been entitled to unreduced survivor's benefit if he or she remarries after age 60. Congress also amended Section 216(d)(2) of the Act to reduce from 20 to 10 years the period during which a surviving divorced wife must have been married to the primary wage earner in order to be eligible for widow's benefits (Pub. L. No. 95-216, § 337(a), 91 Stat. 1548), but it retained the provision in Section 202(e)(1)(A) that generally barred a surviving divorced wife from receiving benefits upon remarriage.

Although Congress had permitted surviving divorced wives to receive widow's benefits in certain circumstances, it

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[3] Although the survivor's benefits of a surviving divorced wife would terminate if she married a person receiving old-age benefits, she would become eligible for wife's benefits on her new husband's account.

[4] As originally enacted, the relevant age for widowers was 62. That age was reduced to 60 in 1972. Pub. L. No. 92-603, § 107(a)(3), 86 Stat. 1343.

had not to this point expressly provided for surviving divorced husbands to receive widower's benefits. In 1980, this distinction was held unconstitutional. *Ambrose* v. *Califano*, [1980] Unempl. Ins. Rep. (CCH) ¶ 17,702 (D. Ore.). The Solicitor General determined that an appeal would not be taken to this Court in *Ambrose* because the distinction could not be defended under this Court's decisions concerning discrimination on the basis of gender. 47 Fed. Reg. 12161 (1982). Accordingly, the Secretary promulgated regulations extending benefits to surviving divorced husbands on the same basis as they were provided by statute to surviving divorced wives. See *ibid.*; 20 C.F.R. 404.336. In 1983, as part of a general elimination of gender-based distinctions, Congress amended Section 202(f)(1) of the Act expressly to make surviving divorced husbands eligible for widowers' benefits. Pub. L. No. 98-21, § 301(b)(1), 97 Stat. 111.

d. Finally, in 1983, Congress amended the Act to provide that surviving divorced wives and husbands who remarry after age 60 may receive benefits in the same manner as widows and widowers. See Section 202(e)(3) and (f)(4) of the Act, as amended and redesignated by Pub. L. No. 98-21, §§ 131(a)(2), (a)(3)(A), (b)(2), (b)(3)(A) and (d)(1), 301(b)(4), 97 Stat. 92, 93, and 111. As a result, otherwise eligible members of the appellee class have been entitled to receive monthly widow's or widower's benefits since January 1984.

2. Procedural Provisions

Claims for survivor's and other benefits under Title II of the Social Security Act are considered by the Secretary pursuant to special procedures prescribed by Congress and the Secretary. The principal statutory provision pertaining to administrative review is Section 205(b) of the Act, 42 U.S.C. 405(b), under which the Secretary "is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment" under Title II. Section 205(b) further provides that if the individual is dissatisfied with the Secretary's preliminary "decision," the Secretary shall afford him a right to a hearing.

Pursuant to her authority under Section 205(a) of the Act "to make rules and regulations and to establish procedures"

(42 U.S.C. 405(a)), the Secretary has fleshed out these general statutory directives by establishing a four-step administrative procedure for review by the Social Security Administration (SSA) of claims for benefits: the initial determination (20 C.F.R. 404.902-404.904); de novo reconsideration (20 C.F.R. 404.907-404.921); an evidentiary hearing before an administrative law judge (ALJ) (20 C.F.R. 404.944-404.965); and discretionary review by the Appeals Council (20 C.F.R. 404.967-404.983). The Secretary's decision rendered at the initial determination, reconsideration, or ALJ hearing stage is expressly made "binding" on the claimant unless he seeks further administrative review within 60 days. 20 C.F.R. 404.905, 404.909(a)(1), 404.920, 404.933(b)(1), 404.955(a), 404.968(a)(1).

"These four steps exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 3. Under Section 205(g) of the Act, 42 U.S.C. 405(g), the claimant, after the "final decision" of the Secretary made "after a hearing," may obtain judicial review of the final decision "by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." If the claimant does not seek judicial review within 60 days of the Appeals Council's decision, the adverse Appeals Council's decision (or the ALJ's decision if the Appeals Council denied review) is expressly made "binding" on the claimant. 20 C.F.R. 404.955(b), 404.981.

The Secretary has carved out only "one exception" to the exhaustion requirement. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2 & n.2. This exception is in the form of an expedited administrative appeals procedure, under which the Secretary will formally waive the requirement that the individual claimant fully exhaust his administrative remedies through the Appeals Council stage if the individual's claim for benefits has been denied at the reconsideration level, if he does not dispute the Secretary's findings of fact or interpretation or application of controlling law, and if the claimant alleges (and the Secretary agrees) that the only factor precluding an allowance of the claim is a statutory provision that the claimant contends is unconstitutional. In such a

situation, a representative of the Secretary may enter into a formal agreement with the individual claimant deeming the reconsideration decision to be the Secretary's "final decision" for purposes of seeking judicial review pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.923-404.926. The claimant then has 60 days within which to seek judicial review. 20 C.F.R. 404.927.

B. The Proceedings in this Case

1. a. Appellee Buenta Owens was married to Russell Judd in 1937 and divorced from him in 1968. In 1978, at the age of 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Buenta Owens applied for surviving divorced wife's benefits on the basis of Judd's earnings account. Her claim was denied. On October 19, 1982, Buenta Owens requested administrative reconsideration of that denial, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again was denied in a reconsideration determination dated December 7, 1982. App., *infra*, 1a, 13a-14a, 31a-32a; B.R. 2, 6-7, 9-10.[5]

Buenta Owens requested that her claim be considered under the expedited administrative appeals procedure provided by the Secretary's regulations, discussed above (see pages 6-7, *supra*). B.R. 9. The designated representative of the Secretary determined that it would be appropriate to use this procedure, and he entered into an agreement with her to that effect dated March 3, 1983 (App., *infra*, 50a-51a). The agreement states that Buenta Owens "accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd"; that she also "accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination"; and that except for the statutory provisions

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[5] "B.R." refers to the transcript of the administrative record on the claim of appellee Buenta Owens that was filed in district court pursuant to 42 U.S.C. 405(g). "K.R." refers to the transcript of the administrative record on the claim of appellee Kenneth Owens.

whose constitutionality she challenges, "the right of the claimant to benefits has been established by the claimant" (*id.* at 50a). On this basis, the agreement provides that "[t]he above-referenced reconsideration determination represents the final decision of the Secretary"; that the agreement "constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeal process"; and that she has 60 days within which to file a civil action to raise the constitutional issue (*id.* at 50a-51a). Buenta Owens then filed the contemplated civil action in the United States District Court for the Central District of California on April 19, 1983, seeking to represent a nationwide class of surviving divorced spouses. Complaint ¶ 6.

b. Appellee Kenneth Owens was married to Dorothy L. Owens in 1934 and was divorced from her in 1978. He then married appellee Buenta Owens in 1978, when he was 60 years old. On July 15, 1982, Kenneth Owens applied for survivor's benefits based on the earnings account of his first wife, who had since died. His claim was denied at the initial determination stage and in a reconsideration decision dated May 12, 1983. He likewise requested to use the expedited administrative appeals procedure, and on November 23, 1983, a representative of the Secretary entered into an agreement with him under that procedure. App., *infra*, 14a, 32a, 52a-53a; K.R., 1-2, 14-18, 31, 34. On January 6, 1984, Kenneth Owens then filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions. His class action subsequently was consolidated with that filed by his wife (App., *infra*, 13a, 15a).

2. a. In the action brought by Buenta Owens, the district court at first rejected appellees' constitutional challenge to the statutory provisions in an opinion dated December 23, 1983—before Kenneth Owens filed suit (App., *infra*, 1a-12a). The court rejected the contention that strict scrutiny of the challenged provisions was required because they created a "disincentive" to marry (*id.* at 5a-7a). The court explained that this Court has applied strict scrutiny only when the government "created substantial legal obstacles to entry into

or exit from the marital state" (*id.* at 6a, citing *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). By contrast, the district court observed, this Court has applied the rational basis standard in reviewing provisions of the Social Security Act that deny benefits to some persons, but not others, based upon their marital status (App., *infra*, 6a, citing *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977)). Applying the rational basis test, the court sustained the statutory distinction (App., *infra*, 7a-12a). It reasoned that, as in *Califano* v. *Jobst*, 434 U.S. at 57-58, Congress reasonably could decide to take one step at a time in removing the perceived hardship of the remarriage rule—lifting it as to widowed spouses effective January 1979 and as to surviving divorced spouses effective January 1984 (App., *infra*, 10a-11a).

b. Buenta Owens then filed a motion to alter or amend the judgment. While that motion was pending, the court, by order dated August 28, 1984, certified a nationwide class of surviving divorced spouses who remarried after age 60 and who were denied monthly benefits for any month after December 1978, provided that the claimant's application was filed on or after August 20, 1982 or the time within which to seek review of a decision denying his claim had not expired on that date (App., *infra*, 13a-28a; see *id.* at 28a, 44a). The district court acknowledged that 42 U.S.C. 405(g) was the exclusive source of jurisdiction over the suit and that, under *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), a class may be certified only if all of the members satisfy all of the requirements for judicial review set out in Section 405(g). Nevertheless, the court included in the class individuals who had not exhausted their administrative remedies or who had not sought judicial review within 60 days of the final decision denying their claims for benefits.

Citing the Secretary's regulations under which appellees Buenta and Kenneth Owens had entered into an agreement with the Secretary waiving exhaustion with regard to their claims for benefits, the court held that the Secretary had waived exhaustion for *all* class members, without regard to whether the Secretary had entered into a comparable agree-

ment with them (App., *infra*, 17a-18a). The court further held that a court in any event may excuse compliance with the exhaustion requirement on a class-wide basis where the constitutionality of a statutory provision is at issue (*id.* at 18a-19a).

Similarly, the court treated the 60-day requirement as an ordinary statute of limitations and held that running of the 60-day period should be tolled retroactively as to all class members on a nationwide basis as of October 19, 1982, the date on which appellee Buenta Owens sought administrative reconsideration of the initial determination denying her claim for benefits (App., *infra*, 20a-21a). In the court's view, the filing of this "single administrative complaint" by Buenta Owens gave the Secretary adequate notice of the constitutional contention and an opportunity to evaluate its effects on similarly situated persons (*id.* at 21a). Accordingly, the court included in the class any individual who had a live claim for benefits pending administratively on or after August 20, 1982, which was 60 days before Buenta Owens requested reconsideration (*id.* at 22a) but more than eight months before she filed suit.

c. After it certified a nationwide class, the court, by opinion and order dated October 5, 1984, reversed its prior ruling on the merits and held unconstitutional the challenged distinction between surviving widowed and divorced spouses (App., *infra*, 29a, 30a-43a). The court again acknowledged that "[t]he one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here" (*id.* at 39a). But this time the court found that justification insufficient. The court explained that "Congress must have a rational basis for each step it takes" and that the statutory distinction "must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses" (*id.* at 40a). The court expressly agreed with the Secretary that Congress rationally *could* so assume (*id.* at 42a). But the court nevertheless held that the challenged distinction was irrational because Congress chose to treat surviving widowed spouses and surviving divorced spouses the same upon

the death of the primary wage earner, and there was, in the court's view, no "logical basis" to distinguish between them upon their subsequent remarriage *(ibid.)*. The court therefore enjoined the Secretary from applying the challenged provisions to appellees Buenta and Kenneth Owens and other eligible class members, to pay retroactive benefits to them, and to determine and assure payment of survivor's benefits to other class members within 120 days (*id.* at 44a-46a).

THE QUESTIONS ARE SUBSTANTIAL

The district court has held several provisions of an Act of Congress unconstitutional. That holding is plainly wrong. This Court has made clear that Congress rationally could determine that divorced husbands and wives depend less on each other than do couples who remain married. *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976). As the district court in this case expressly acknowledged, Congress also rationally could determine that this difference continues after the death of the primary wage earner (App., *infra*, 42a). If this much is conceded, Congress surely can draw this same distinction in determining whether surviving spouses and former spouses should be entitled to benefits even after they remarry. Contrary to the district court's apparent belief, the fact that Congress, in its discretion, has chosen to treat widowed and certain divorced spouses in a similar manner for one purpose (their entitlement to survivor's benefits upon the death of the primary wage earner) does not mean that the two categories are constitutionally indistinguishable for all purposes or that Congress is somehow estopped from treating them differently as regards their entitlement to survivor's benefits upon remarriage.

The particular statutory distinction appellees challenge existed only during one relatively brief portion of the extended period over which Congress has adjusted and expanded the respective eligibilities of spouses and former spouses to receive Social Security benefits. If the district court had limited the impact of its decision in this case by awarding benefits only to the two named appellees, it might have been appropriate for the Secretary to forgo an appeal,

because Congress now has eliminated the particular distinction the court invalidated. But rather than limiting its holding, the district court compounded its error by ordering relief to a nationwide class that includes numerous individuals who did not exhaust their administrative remedies or seek judicial review within 60 days, and who thereby effectively abandoned their individual claims for benefits. This holding is flatly inconsistent with the plain language of 42 U.S.C. 405(g), implementing regulations, and this Court's decisions. The district court's cavalier disregard of these explicit jurisdictional prerequisites unfortunately is typical of the approach by a number of lower courts in the face of this Court's clear pronouncements, most recently in *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984). The result has been substantial disruption of the orderly administrative review of claims for benefits under the vast Social Security program. These issues therefore independently warrant review.

1. The district court clearly erred in holding that the statutory distinction between surviving widowed spouses and surviving divorced spouses who remarry is unconstitutional. Indeed, that holding is foreclosed by this Court's decisions in *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977).

a. The legal principles governing the resolution of this case are firmly settled. Where, as here, a statutory classification does not impinge on a fundamental right protected by the Constitution,[6] the classification is unconstitutional only if "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the

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[6] The district court correctly held that the statutory provisions denying survivor's benefits to divorced spouses who remarry do not impermissibly impinge on the exercise of a fundamental right to marry merely because they create a distinction on the basis of marital status (App., *infra*, 5a-7a, 36a-38a). In fact, this Court, applying the rational basis test, already has sustained the constitutionality of the general rule terminating entitlement to secondary Social Security benefits upon marriage, even though such provisions "may have an impact on a * * * beneficiary's desire to marry, and may make some suitors less welcome than others." *Califano* v. *Jobst*, 434 U.S. at 58. See also *id.* at 54.

legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 177 (1980). This conclusion has particular force in the distribution of Social Security benefits, because "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937).

b. In this case, the statutory classification plainly is the product of a careful "exercise of judgment" by Congress, not a "display of arbitrary power." Each of the factors on which the denial of benefits to appellees was based—their divorce and their subsequent remarriage—long has been utilized in determining eligibility for secondary benefits under the Social Security Act, and each has already been sustained by this Court as an independently sufficient basis for distinguishing between classes of potential beneficiaries.

In *Califano* v. *Jobst*, *supra*, the Court held that the uniform rule prior to 1958, under which Social Security benefits payable to all secondary beneficiaries were terminated upon remarriage, was "unquestionably valid." 434 U.S. at 54. The Court in *Jobst* considered that rule in the context of the eligibility of a disabled person to receive child's benefits after remarriage, but the Court's observations are equally applicable here (*id.* at 53):

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

Similarly, in the present context, Congress rationally could conclude that a surviving divorced spouse who remarries is less likely to be dependent on the resources of the former spouse than one who does not remarry. For this reason, Congress's decision to terminate a surviving divorced spouse's entitlement to benefits upon remarriage is, in itself, plainly rational.

The district court did not dispute that Congress constitutionally may terminate a person's entitlement to secondary benefits upon remarriage. But the court held that Congress was foreclosed from doing so after 1979 with regard to surviving divorced spouses who remarry after reaching age 60 because Congress in 1979 permitted widowed spouses who remarry at that age to receive survivor's benefits. The court concluded that Congress could not rationally distinguish between widowed and surviving divorced spouses in this manner (App., *infra*, 42a). This holding ignores both the significance Congress long has placed on divorce as it affects eligibility for Social Security benefits and this Court's conclusion that it is constitutional for Congress to do so.

In *Mathews* v. *De Castro*, *supra*, the Court unanimously sustained the constitutionality of provisions of the Social Security Act that provided for the payment of benefits to a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a divorced woman. The Court explained (429 U.S. at 188):

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

This same rationale applies to the survivor's benefits at issue here. Congress rationally could determine that a divorced spouse in general would be less dependent upon the primary wage earner at the time of the latter's death than would a spouse who remained married to the wage earner

until the time of his death. Thus, it seems clear that Congress constitutionally could have chosen to deny secondary benefits to all divorced and surviving divorced spouses. In fact, Congress did precisely that for the first 25 years of the Social Security program: although Congress provided benefits for wives and widows in 1939, it was not until 1965 that Congress provided parallel benefits for divorced wives and surviving divorced wives. See pages 2-3, *supra*.

Even in 1965, Congress did not treat the two categories the same, and it has not done so to this day. Under the 1965 provisions, a divorced wife, unlike a wife or widow, could receive benefits only if she established that she had received substantial support from her former husband (a requirement that was not eliminated until 1972). In addition, although a surviving divorced wife lost her benefits if she remarried, a widow could continue to receive benefits (albeit reduced) if she married a man who was not entitled to benefits under the Act. Congress's elimination in 1977 of the remarriage rule for widows and widowers, but not for surviving divorced spouses, therefore did not introduce an unfamiliar distinction into the law. By the same token, Congress provided in 1965 that a divorced wife could receive secondary benefits only if she had been married to the principal wage earner for more than 20 years. See pages 2-3, *supra*. By contrast, the durational requirement for a husband, wife, widow or widower was far shorter, and now generally is no more than one year. See 42 U.S.C. 416(b), (c)(5), (f) and (g)(5). In sum, differing treatment of divorced spouses and spouses who remained married is a consistent theme in the Social Security Act.[7] Congress's drawing on that familiar distinction in 1979 (and before) as regards the eligibility for survivor's benefits upon remarriage therefore is manifestly not "utterly

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[7] Nor is that differing treatment uniformly disadvantageous. Although the Act places a family maximum on the total of benefits paid on one wage earner's account at any one time, benefits paid to a divorced spouse or surviving divorced spouse are not subject to that maximum and do not count against the maximum as applied to other benefits paid on the account. 42 U.S.C. 403(a)(3)(C).

lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). Compare *Fritz*, 449 U.S. at 178 & n.11.

c. The district court in fact expressly agreed with the Secretary that Congress rationally could assume that surviving divorced spouses are generally less dependent upon the resources of the deceased primary wage earner than are widowed spouses (App., *infra*, 42a). But the court held that because Congress had chosen to treat the two categories the same upon the death of the primary wage earner, it could not distinguish between them upon their subsequent remarriage. This reasoning is seriously flawed.

As an initial matter, the district court was mistaken in its underlying premise that Congress in 1979 treated divorced spouses the same as spouses who remained married to the primary wage earner for purposes of determining eligibility for survivor's benefits upon the death of the wage earner. A divorced wife could receive survivor's benefits only if she had been married to the wage earner for 10 years; the durational requirement for a widow or widower was a year or less. Obviously, Congress did not view the two categories to be equally entitled to receive secondary benefits.

In any event, the fact that Congress, in its discretion, elected to treat this narrow group of divorced wives in a manner similar to widows and widowers by making them eligible for survivor's benefits does not mean that Congress actually found them to be indentically situated even in that setting. Far less does it render the two groups *constitutionally* indistinguishable or estop Congress from treating them differently for other purposes. In the present context, for example, Congress might well have believed that there were sufficient similarities between the two groups to warrant similar treatment upon the death of the primary wage earner, notwithstanding the existence of substantial differences as well, or that considerations of uniformity or ease of administration warranted similar treatment for that purpose. Such a judgment cannot constitutionally disable Congress from responding to the residual differences between the two groups in determining their continued entitlement to survivor's benefits upon remarriage.

This conclusion is especially compelling when it is considered that Congress often must proceed one step at a time when expanding or adjusting benefits and entitlements under this "complex statutory scheme" (*Califano* v. *Jobst*, 434 U.S. at 52). Congress has done so in several respects that bear directly on this case. First, Congress often has delayed before conforming the entitlement of divorced spouses and surviving divorced spouses to that of wives, husbands, widows, and widowers. That delay may be explained by a belief that the latter have a stronger equitable claim to receive benefits that were originally intended for members of the wage earner's family than do persons for whom those family ties have been broken. Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 178.

Second, Congress has moved cautiously and incrementally in modifying the remarriage rule under the Social Security Act. See *Califano* v. *Jobst*, 434 U.S. at 54-57. As the district court acknowledged, the House version of the bill enacted in 1977 contained an "across-the-board elimination of the general remarriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses"; this was a "broad change" that in its first year of operation alone would have created "an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits" (App., *infra*, 3a-4a, citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I at 47-48 (1977), *id.* Pt. II, at 73). No similar provision was contained in the Senate bill, and it is not surprising that it was deleted in Conference in favor of a more modest provision to repeal the remarriage rule only for widows and widowers. See H.R. Conf. Rep. 95-837, 95th Cong., 2d Sess. (1977). Congress presumably believed that widows and widowers had the strongest claim to receive benefits after remarriage, and it chose to "concentrate limited funds where the need is likely to be greatest" (*Califano* v. *Boles*, 443 U.S. at 296).

As this Court observed in a nearly identical context (*Califano* v. *Jobst*, 434 U.S. at 57-58):

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire ob-

> jective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [(1950)]. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the [appellees].

Congress might well be deterred from taking measures to alleviate what it believes to be the greatest hardships or inequities in the Social Security Act and similar legislation if its decisions to proceed in this cautious fashion are invalidated because they do not go far enough. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97. This faith in the democratic process was vindicated in the present case, because Congress enacted legislation to eliminate the distinction appellees' challenge almost 18 months *before* the district court declared the distinction unconstitutional.

2. The district court also clearly erred in its threshold certification of a class. As the district court itself recognized (App., *infra*, 15a-16a), in order for a class to be certified, each member of the proposed class must individually satisfy the requirements for judicial review set out in 42 U.S.C. 405(g). See *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975). Yet the court proceeded to certify a class in utter disregard of the explicit requirements in 42 U.S.C. 405(g) that each class member must have received a "final decision" of the Secretary on his own individual claim for benefits and may obtain judicial review only by filing a civil action within 60 days of that final decision.

a. The Court held in *Salfi* that the meaning of the term "final decision" in 42 U.S.C. 405(g) "is left to the Secretary to flesh out by regulation" and that she may "specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (422 U.S. at 766 & n.9). As the Court recognized, governing regulations specify that the finality required for judicial review is

achieved only after the ALJ hearing and Appeals Council stages are completed (*id.* at 765). See 20 C.F.R. 404.900(a)(5). See also *Heckler* v. *Ringer*, slip op. 2. There is no allegation in the complaint in this case that the unnamed class members actually pursued their administrative remedies through the Appeals Council stage to obtain the requisite "final decision." The district court therefore "was without jurisdiction over so much of the complaint[s] as concern the class, and it should have entered an appropriate order of dismissal." *Salfi*, 422 U.S. at 764.

Instead of ordering dismissal of the class claims, however, the court excused all of the unnamed class members from the exhaustion required by the Secretary's regulations based on the court's own view that exhaustion would be futile (App., *infra*, 18a-19a). The district court's action was flatly inconsistent with *Salfi*. There, the Court held that the requirement that the Secretary have made a "final decision" on the individual's claim for benefits is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed with merely by a judicial conclusion of futility such as that made by the District Court here" (422 U.S. at 766 (emphasis added)).

The Court did observe in *Salfi* that "[w]hile a *court* may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, * * * it would be inconsistent with the congressional scheme to bar the *Secretary* from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final' within the language of § 405(g)." 422 U.S. at 766-767 (emphasis added). The Court concluded that the Secretary properly could make such a determination where she has satisfied herself that the only issue is the constitutionality of a statutory provision that bars payment (*id.* at 765, 767), that "the claim is neither otherwise invalid nor cognizable under a different section of the Act" (*id.* at 765), and that all other issues have been resolved in favor of the claimant without the need for a hearing (*id.* at 767). See also *Heckler* v. *Ringer*, slip op. 14-16 & nn.11 & 12. Contrary to the district court's conclusion (App., *infra*, 17a-18a), however, the Secretary in this case clearly did not make such a determination and ac-

cordingly did not waive the exhaustion requirement for each of the unnamed members of the class.

Following the decision in *Salfi*, the Secretary promulgated the regulations discussed above that establish a procedure for waiving the exhaustion requirement in the circumstances identified in *Salfi*—*i.e.*, where the Secretary has determined that all other issues bearing on the individual's claim for benefits have been resolved and that the only issue barring payment is a statutory provision that the claimant contends is unconstitutional. Pursuant to this procedure, the Secretary entered into a formal agreement with appellees Buenta and Kenneth Owens stipulating to the existence of these conditions as regards their particular claims for benefits, and designating the respective reconsideration decisions denying those claims as the Secretary's "final decisions" for purposes of judicial review under 42 U.S.C. 405(g). But there is no allegation in the complaints that the Secretary has entered into a comparable agreement with any of the unnamed class members.

In promulgating the regulations establishing the expedited appeals procedure, the Secretary explained that where the specified conditions have been satisfied, she could be confident that the particular claim for benefits had been presented at a sufficiently high level to afford the agency an opportunity to correct its errors; to have a complete record with respect to the facts, law, and possible alternative bases of entitlement; and to insure national uniformity. 40 Fed. Reg. 53385 (1975). Compare *Salfi*, 422 U.S. at 764. In such circumstances, the Secretary determined, further administrative review would be "clearly futile." *Ibid.*[8] These procedures thus assure that the question of exhaustion of administrative remedies itself will be presented to and expressly ruled upon by the Secretary and that judicial review will be

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[8] In accordance with the Court's admonition in *Salfi* that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (422 U.S. at 766), the Secretary has specified that the denial of a claimant's request to pursue the expedited appeals procedure "will not be subject to the right to administrative or judicial review." 40 Fed. Reg. 53385 (1975). See 20 C.F.R. 404.902(k).

accelerated only on the basis of a specific finding by the Secretary that the particular claim involved need not be reviewed further administratively. The existence of this administrative procedure also guarantees that the claimant and the Secretary will have formally stipulated to the fact that further exhaustion may be dispensed with in the particular case *prior* to the claimant's filing of an action in court, thereby making it unnecessary for the parties to engage in the sort of wasteful litigation on the exhaustion question that has occurred in this case.

The district court completely ignored the terms and purposes of the regulations establishing a procedure for expedited administrative appeals on a case-by-case basis. It instead erroneously cited to those regulations for the sweeping proposition, never endorsed by this Court, that the Secretary may be held to have waived exhaustion for all unnamed members of a nationwide class, even though the Secretary has *not* made the particularized determination required by those regulations (and contemplated by *Salfi*) that further exhaustion is unnecessary on each individual claim for benefits. Here, the Secretary has *not* stipulated that she has made a final decision for each class member, as she has for Buenta and Kenneth Owens, that the claimant previously was married for the requisite length of time to an insured wage earner, that the claimant has otherwise established his entitlement to benefits, and that the only remaining obstacle to payment is the statutory provision whose constitutionality cannot be resolved by the Secretary.

b. The district court also included in the certified class any individual who happened to have had a claim for benefits pending before SSA on or after August 20, 1982, even though Buenta Owens did not file this class action until April 19, 1983, almost eight months later (App., *infra*, 19a-22a). This aspect of the class certification flies in the face of the requirement in 42 U.S.C. 405(g) that judicial review of the Secretary's "final decision" on any individual's claim for benefits must be sought by (or on behalf of) that individual "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

The Secretary has not exercised her express authority under 42 U.S.C. 405(g) to extend the 60-day period for any of the time-barred individuals the district court included in the class. Under regulations promulgated by the Secretary to implement this extension authority, each such claimant first must file a written request with SSA giving reasons why he did not seek judicial review within the time allowed. The filing time then will be extended for that claimant only if SSA determines that he has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911. There is no indication that any of the class members who received a "final decision" more than 60 days before this suit was filed ever requested the Secretary to extend the filing period under these regulations.

The district court nevertheless excused these class members from the requirement that they seek judicial review within 60 days. The court did so based on its own view that the running of the 60-day period should be "tolled" on a nationwide basis from the date on which appellee Buenta Owens requested administrative reconsideration of her claim (App., *infra*, 21a-22a). In the court's view, Buenta Owens' request for reconsideration sufficiently put the Secretary on notice of the constitutional issue. This is a truly extraordinary notion that, if accepted by this Court, would create havoc in the orderly administration of the Social Security Act. It apparently would eliminate the filing deadline whenever a number of claims for benefits raise a common issue of law—a routine occurrence in the administration of a program under which millions of claims for benefits are filed annually. And it would do so despite the fact that the individuals excused from meeting the 60-day requirement almost invariably would not have the slightest inkling that another claimant, perhaps at the other end of the country, had raised a similar legal issue in administrative proceedings on a wholly separate claim. This casual and haphazard approach to what Congress intended to be a firm filing deadline has no relation whatever to the congressional purpose of eliminating stale claims and establishing repose with respect to the thousands of individual benefit claims that are processed each month. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). Compare

United States v. *Locke*, No. 93-1394 (Apr. 1, 1985), slip op. 9; *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8.

But whatever the merits in the abstract of the novel tolling rule suggested by the district court, it is clear that the court had no authority to impose it.[9] "[T]he United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite" to suit. 422 U.S. at 766. The requirement that an action for judicial review be commenced within 60 days of the mailing of "such decision" (or such further time as the Secretary may allow) appears in the same sentence as the jurisdictional prerequisite of a "final decision," and it likewise is an explicit jurisdictional condition upon which Congress consented to suit under the Social Security Act. A court therefore has no au-

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[9] The only appellate authority the district court cited for this novel "tolling" rule was the Ninth Circuit's decision in *Heckler* v. *Lopez*, 725 F.2d 1489, 1506-1507 (1984). See App., *infra*, 21a-22a. However, this Court unanimously granted a stay of the portion of the judgment in *Lopez* that asserted jurisdiction over the claims of class members who did not satisfy the 60-day filing requirement, *Heckler* v. *Lopez*, No. A-707 (Apr. 30, 1984), and the court of appeals' decision thereafter was vacated by this Court. *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984).

The district court also relied on class action cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (App., *infra*, 21a-22a). That reliance was wholly misplaced. Under Title VII, it is not necessary for each class member to file a charge with the EEOC. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975). Under the Social Security Act, on the other hand, each individual member of a class must file a claim for benefits. *Weinberger* v. *Salfi*, 422 U.S. at 764. When he does so, the time limitations and other requirements of the Act and implementing regulations apply to the ensuing administrative and judicial review of that individual claim and leave no room for the intrusion of tolling notions by a court.

thority to proceed where that 60-day requirement has not been met. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985); *Hunt* v. *Schweiker*, 685 F.2d 121 (4th Cir. 1982).[10] Compare *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). Other courts, however, have reached a contrary conclusion, See, *e.g.*, *City of New York* v. *Heckler*, 742 F.2d 729, 737-738 (2d Cir. 1984) (question "not free from doubt," but holding that 60-day requirement is not jurisdictional); *Mental Health Ass'n* v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983). That conflict warrants resolution by this Court.

Even if the 60-day requirement in 42 U.S.C. 405(g) were not regarded as a jurisdictional prerequisite in the strictest sense,[11] that consequence would furnish no support for the district court's novel "tolling" rule in this case. Statutorily mandated limitations on the time within which a person may bring a suit against the government must be strictly construed, and the courts are not at liberty to fashion tolling

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[10] The holding in *Hunt* v. *Schweiker*,*supra*, that the 60-day requirement in 42 U.S.C. 405(g) is jurisdictional in nature was cited with approval in the extensive discussion of the requirements of 42 U.S.C. 405(g) in the Senate Report on the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* See S. Rep. 98-466, 98th Cong., 2d Sess. 17 (1984).

[11] In *Salfi*, 422 U.S. at 763-764, and *Mathews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976), the Court described the 60-day requirement as a "statute of limitations" that was waived by the Secretary because it was not raised in district court. However, these statements were dicta, because in each instance the claimant had sought judicial review within 60 days. App. (at 1, 9, 17-20), *Weinberger* v. *Salfi*, No. 74-214 (Oct. Term 1974); App. (at 1-3, 14), *Mathews* v. *Eldridge*, No. 74-204 (Oct. Term 1975). Moreover, in other circumstances, the Court has held that the congressionally imposed condition that a suit against the government be filed within a specified time period is not subject to waiver under the usual rules affecting the waiver of a statute of limitations defense. *Munro* v. *United States*, *supra*; *Finn* v. *United States*, *supra*. In any event, even if the 60-day requirement in 42 U.S.C. 405(g) is not "jurisdictional" in the sense that it is not waived even where it is not raised as a defense, a court is not free to excuse compliance with that requirement where, as here, it *is* invoked by the government in the trial court.

rules that Congress has not prescribed. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). Indeed, in this case, the fact that Congress expressly vested in the Secretary, but not the courts, the authority to extend the 60-day filing period where circumstances warrant strongly indicates that Congress intended to foreclose the duplicative fashioning of tolling rules by the courts. Cf. *United States* v. *Locke*, slip op. 9 n.10. Governing regulations reinforce this conclusion, for they expressly provide that an individual forfeits his right to judicial review if he does not file within the 60-day period, unless he establishes "good cause" for the Secretary to extend that period. 20 C.F.R. 404.900(b), 404.987(a).

The district court's holding on the 60-day issue also is directly contrary to this Court's ruling in *Califano* v. *Sanders*, *supra*. After the 60-day period has expired, the claimant may obtain further consideration of his claim only by requesting the Secretary to reopen the adverse administrative decision. See 20 C.F.R. 404.987-404.995. This Court held in *Sanders* that the Secretary's determination not to reopen an adverse decision that the claimant had allowed to become final and binding is not subject to judicial review. The Court explained that a contrary holding would "frustrate the congressional purpose, plainly evidenced in § 205(g), to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"—a limitation that the Court regarded as an aspect of a "policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims." 430 U.S. at 108. The nationwide tolling rule fashioned by the district court in this case would frustrate that congressional policy choice far more severely than would judicial review of the denial of an individual request to reopen, which the Court foreclosed in *Sanders*.

c. The ruling by the district court on the exhaustion and 60-day requirements in 42 U.S.C. 405(g) has the effect in this case of requiring the Secretary to reopen numerous administrative decisions that the individual claimants involved allowed to become final and binding against them when they failed to seek further review in accordance with the requirements of the Act and implementing regulations. The Department of Health and Human Services estimates

that there are approximately 1,000 such individuals. Other courts have ordered a similarly sweeping intrusion into the administration of the Social Security Act in class actions involving thousands of individuals who had abandoned their claims for benefits. See, *e.g.*, *City of New York* v. *Heckler*, *supra*; *Polaski* v. *Heckler*, 751 F.2d 943 (8th Cir. 1984). These jurisdictional issues are of broad importance in the administration of the Social Security Act and independently warrant review by the Court.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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JUNE 1985

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFF,

v.

MARGARET M. HECKLER, ETC., DEFENDANTS.

[FILED DEC. 23, 1983]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

In this action, plaintiff challenges the constitutionality of that portion of Title II of the Social Security Act which provides that widows aged 60 and over may remarry and retain their social security benefits while surviving divorced spouses of that age lose their benefits if they remarry. Both parties have stipulated to the facts as set out in earlier administrative proceedings. Each side now moves for summary judgment.

I. FACTUAL BACKGROUND

Plaintiff, Buenta M. Owens, was divorced from her husband of more than 30 years, Russell B. Judd, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on June 19, 1982. Thereafter, the plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Plaintiff sought reconsideration but the Department again denied plaintiff's application on the same grounds.

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act.... Mrs. Owens contends that the provision is unconstitutional that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcript of Administrative Proceedings at 2 ¶ C.

Plaintiff brings suit under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), seeking a declaration that the challenged statutory scheme is unconstitutional and that plaintiff remains entitled to benefits despite her remarriage. Plaintiff further seeks an injunction preventing defendant from denying benefits to surviving divorced spouses who remarry at age 60 or older, and an order mandating that defendant pay plaintiff those benefits previously denied, and to continue those benefits into the future.[1]

II. DISCUSSION

A. The Legislative Scheme and History

Congress passed the Social Security Act in 1935, thereby providing benefits for qualified wage earners. Pub. L. No. 74-271, 49 Stat. 620, 622-24 (1935). Secondary benefits, those for wives, children, widows and parents—persons presumed to be dependent upon the primary wage-earner—were provided in the Social Security Act Amendments of 1939. Pub. L. No. 76-379, 53 Stat. 1360, 1364-66 (1939). Under the Act at that time, secondary beneficiaries lost their benefits upon change in their marital status.[2] This provision has become known as the general marriage rule. In its original 1939 form, the rule included a provision that entitled widows would lose their benefits upon remarriage. 53 Stat. ___. It is this provision, as later amended, which is challenged in this

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[1] In her complaint, plaintiff includes a class allegation and seeks relief on a class-wide basis. Plaintiff has delayed making a motion for class certification until the resolution of these cross-motions for summary judgment.

[2] The marriage restrictions applied to wives, 53 Stat. at 1364, section 202(b)(1); children, 53 Stat. at 1364, section 202(c)(1); widows, 53 Stat. at 1365, section 202(d)(1); and parents, 53 Stat. at 1366, section 202(f)(1).

action. The Court will refer to this portion of the general marriage rule as the remarriage rule.

In 1958, Congress enacted the first exception to the remarriage rule, providing that if an entitled widow married a man also entitled to benefits under the Act, the widow would not lose her entitlement. Pub. L. No. 85-840, § 307(b), 72 Stat. 1013, 1031. In 1965, Congress expanded the category of secondary beneficiaries to include surviving divorced spouses. Social Security Amendments of 1965, Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 286, 376 (1965). The benefits for surviving divorced spouses terminated upon remarriage. *Id.* at 376-77.

In 1977, Congress eliminated the marriage rule for widows who attained the age of 60. Social Security Amendments of 1977, Pub. L. No. 95-216 § 336(a)(3), 91 Stat. 1509, 1547 (1977). Congress added section 202(e)(4) which provided that, for the purpose of the remarriage rule, section 202(e)(1)(A), if a widow remarries after reaching 60, the new marriage is "deemed not to have occurred." It is this provision, enacted as 42 U.S.C. § 402(e)(4), (1982 Supp.), which plaintiff now challenges.

When the 1977 amendments to the Act were first introduced in the House of Representatives, the proposed legislation included broad changes in the general marriage rule, including elimination of the remarriage rule for *both* widows and surviving divorced spouses aged 60 and above. The Senate, however, removed that portion of the bill which eliminated the remarriage rule for surviving divorced spouses. The Senate's version was enacted into law. *See* 42 U.S.C. § 402(e)(4).

The legislative history on the 1977 amendments relating to the remarriage rule is sparse. The House report on the original version noted that it proposed an across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses.[3] The report stated that in the first

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[3] The only substantive discussion of the marriage rule changes is found in the original House report, which stated:

> Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child

year of operation, this broad change would create an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits. H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 47-48, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4204-05. No breakdown was given for the change in the remarriage rule.[4] The later House conference report notes the Senate's deletion of the remarriage rule exemption for surviving divorced spouses but offers no explanation for the deletion. H. Rep. No. 702, Part II, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4319.

In 1983, Congress made further revisions to the Act and eliminated the discriminatory impact of the remarriage rule upon surviving divorced spouses. Congress enacted amend-

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> prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.
>
> Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts. Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse (including those with an entitled child in their case), parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits.

H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Cong. & Ad. News 4155, 4319.

[4] A budgetary report on the 1983 amendments, which eliminate the widow-surviving divorced spouse distinction suggests that the reform of the remarriage rule may not have been a great contributory to this cost. The change—allowing remarriage for surviving divorced spouses as well as widows after age 59, was estimated to cost less than $50 million a year and to have a "negligible" long term fiscal impact. S. Rep. No. 23, 98th Cong., 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May 1983 at 158.

ments allowing surviving divorced spouses 60 or older to retain their benefits upon remarriage in the same fashion as widows. Social Security Amendments of 1983, Pub. L. No. 98-21 § 131, 97 Stat. 65, 92 (1983). When this law goes into effect in January, 1984, *both* widows and surviving divorced wives, age 60 and above, may remarry and retain their benefits, thus eliminating the discrimination challenged here.

The legislative history on the 1983 amendment of the remarriage rule is no more revealing than that of the 1977 amendment. In the Senate and House reports, it was noted that the change in section (e)(4) will bring the treatment of surviving divorced spouses who remarry after attaining age 60 into line with that of their widow counterparts. No explanation was offered for the original distinction between the two groups. H. Rep. 25, 98th Cong., 1st Sess. 56-57, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May, 1983, 275-76; S. Rep. 23, 98th Cong. 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, May 1983, 158.

B. The Standard of Review

Plaintiff argues that the discriminatory statutory scheme operates as a strong disincentive to marry and thus infringes her fundamental right to marry under the equal protection portion of the fifth amendment's due process clause. If a fundamental right is infringed, of course, strict scrutiny must apply. Defendant responds that the statute's indirect effect on marriage is insufficient to represent a fundamental right infringement and, thus, the rational basis test should be applied.

The Supreme Court has recognized that the right to marry is fundamental and its infringement by the state is subject to strict scrutiny. *E.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Zablocki* v. *Redhail*, 434 U.S. 374, 384-86 (1978). Only serious infringements of the right trigger strict scrutiny, however, In *Zablocki*, the Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to en-

> ter into the marital relationship may legitimately be imposed.

434 U.S. at 386.

The Court has only applied strict scrutiny in those instances when the challenged state's action created substantial legal obstacles to entry into or exit from the marital state. In *Zablocki*, for example, the Court struck down a state law which mandated that persons who had children to whom they owed a court-mandated obligation of support were required to prove their children were not then, and never would, become public charges before being permitted to marry. *See also Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (violation of due process for state to require indigents to pay filing fees in order to obtain divorce); *Loving* v. *Virginia*, *supra*, (state law banning marriages between persons of different race).

By contrast, in two recent cases involving challenges to marital classifications in the Social Security Act, the Court applied the rational basis test. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), plaintiff challenged as unconstitutional under equal protection a provision which allowed a married woman under 62 with a dependent child to receive benefits if her husband retired or became disabled but allowed no benefits for a similarly situated divorcee whose former husband retired or became disabled. The Court found the statute constitutional, holding that in the expenditure of funds for the public welfare, "a government does not deny equal protection 'merely because the classifications made by its laws are imperfect.'" 429 U.S. at 185. (citation ommitted) Such laws need only have a rational basis to pass constitutional muster. *Id.*

Similarly, in *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court was faced with an equal protection challenge to a Social Security Act provision which allowed persons entitled to dependent child benefits to retain those benefits if they married others so entitled but terminated the benefits if they married an unentitled person. This provision also operated as a disincentive to marriage for some persons. The Court, however, applied rational basis analysis and upheld the statute.

Plaintiff argues that section 402(e)(4)'s exemption for widows but not surviving divorced spouses represents a significant interference with the right to marry. Plaintiff contends that the section's disparate treatment of the two groups imposes a strong disincentive to remarriage for surviving divorced spouses. Plaintiff may be correct, however, this disincentive, under the foregoing authority, does not rise to the level of a significant interference with a fundamental right. Unlike the Supreme Court cases applying strict scrutiny, the section erects no direct legal obstacles to marriage—it simply makes marriage more costly. *Cf. Loving, Boddie, Zablocki.* Like the Supreme Court cases applying rational basis analysis, the section simply utilizes marriage as a means of categorizing potential beneficiaries. *See de Castro, Jobst.* Section 402(E)(4) [*sic*] therefore represents only an incidental regulation of marriage and must meet only the rational basis test to pass constitutional scrutiny.

C. The Rational Basis Test Applied

The rational basis test requires that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.... As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps, would have preferred." *Schweiker* v. *Wilson,* 450 U.S. 221, 230, 235 (1981). Under the analysis, statutes are entitled to a strong presumption of constitutionality. *De Castro,* 429 U.S. at 185. In applying the rational basis test, the Court need not ascertain the actual purpose of the statute. The Ninth Circuit has recently held:

> [A] court may hypothesize legislative purposes: "where there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' [citation omitted] because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179, 101 S. Ct. 453, 461, 66 L.Ed.2d 368 (1980).

Brandwein v. *California Board of Osteopathic Examiners*, 708 F.2d 1466, 1471 (9th Cir. 1983). In order to find a statute constitutional under the rational basis test, a court need only determine that there is a "conceivable legitimate purpose which would justify the distinctions made in the state's regulatory scheme." *Id.* at 1471.

As noted above, the legislative history of the challenged Act provision is silent on the reason for the disparate treatment of widows and surviving divorced spouses with regard to remarriage after attaining the age of 60. Plaintiff urges that the failure to extend the rule exemption to surviving divorced spouses was not only unexplained at the time of passage but remains rationally inexplicable today. Defendant, however, offers two conceivable bases for the statutory distinction: (1) that Congress could have rationally distinguished between widows and surviving divorced spouses on the basis for their differing dependence on the primary wage earner, and (2) that Congress rationally could have decided to remedy the problems created by termination of benefits on remarriage one step at a time, extending benefits first to widows and later to surviving divorced spouses.

1. Assumption of Varying Dependence

The Supreme Court has recognized that the provision of secondary benefits under the Social Security Act is not part of a general welfare scheme based on individualized need, but an attempt to alleviate general problems of economic dependency by distributing benefits to those persons presumed to be dependent. "Instead of requiring individualized proof on case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 53. Thus, a challenged provision must be examined with reference to the rationale for the choice of the general criteria, not whether the individual situation of the plaintiff with reference to the statute is rationally defensible.

Defendant cites *Mathews* v. *de Castro* for the proposition that Congress may rationally assume that divorced women are less dependent on the support of their former husbands than married women on their partners. Justice Stewart,

writing for the Court, found that Congress' distinction between *married* women under 62 who have both dependent children and retired or disabled husbands (who receive benefits) and *divorced* women under 62 with dependent children and retired or disabled ex-husbands (who receive no benefits) was rationally based on an assumption of greater need on the part of the former than the latter.

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives.

429 U.S. at 188-89.

Defendant contends that *de Castro* resolves the present controversy in that there the Court recognized a general dependency distinction between married and divorced wives and that this distinction holds as well for widows and surviving divorced spouses. The Court disagrees, finding that *de Castro*'s holding as to married and divorced wives rested explicitly upon considerations of dependency during the lifetime of the primary wage earner and thus is inapplicable to the issue of widows' and surviving divorced spouses' dependence upon a now-deceased primary wage earner. For example, the Supreme Court in *de Castro* found that married wives may be more dependent than divorced wives because married women may have to stay home to care for their disabled husbands, while divorced women are free to leave the home and obtain employment. Following the husband's demise, however, neither widows nor surviving divorced spouses are tied to the home.

Nor has Congress made an across-the-board distinction between widows and surviving spouses which would independently support an assumption of varying dependence. Congress has allowed both groups benefits after the death of the primary wage earner. The only distinction between the groups comes after remarriage following death, not after divorce or the last of it. Thus Congress is not implying that divorced persons are more likely to "go their own way" after divorce—divorce does not trigger the critical distinction—remarriage does. In order to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*. No tenable basis for such a distinction has been presented, nor is one discernible to the Court. The Court, therefore, finds that the statutory distinction between widows and surviving divorced spouses may not be constitutionally upheld on an assumption of the varying dependence of the two groups.

2. One Step at a Time

Defendant also contends Congress may rationally have decided not to eliminate all of the hardships of the remarriage rule at once, but rather, given the costs of reform, might have chosen to solve the problem "one step at a time." With particular regard to the remarriage rule involved here, defendant argues that Congress could rationally have resolved to eliminate it in stages, first as it applies to widows, and then as it applies to surviving divorced spouses.

The Supreme Court has approved the one step at a time approach under the rational basis test in a variety of statutory contexts. In *Schweiker* v. *Wilson*, 450 U.S. 221 (1981), the Court upheld the federal statutory scheme which denied Supplemental Security Income (SSI) benefits to mentally ill individuals, otherwise qualified, between the ages of 21 and 64, who reside in public institutions that do not receive Medicaid funds for the individuals' care. If the individuals resided in an institution receiving Medicaid funds, the individuals would receive benefits. The Court determined that Congress "rationally may elect to shoulder only part of the

burden" of providing benefits to the institutionalized and that it could rationally limit the provision to those for whom the federal government was already paying out funds. 450 U.S. at 238. The Court noted that, "[a]warding this type of benefits inevitably involves the kind of line-drawing that will have some comparably needy person outside the favored circle." *Id.*

The Court took a similar approach in *Califano* v. *Jobst*, with regard to the general marriage rule enacted as part of the Social Security Act. The Court held:

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. [citation omitted] Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts.

434 U.S. at 57-58. *See also Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955) ("the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.")

The remarriage rule may be similarly justified. Congress has, in fact, taken a one step at a time approach to its elimination, removing it as to widows 60 and over in 1977 and as to surviving divorced spouses 60 and over in 1983. Although in the interim the different treatment between the two groups may seem unwarranted, even unfair, this is the sort of inevitable line-drawing which a court, under rational basis, must tolerate. The Court finds that the distinction between widows and surviving divorced spouses drawn by 42 U.S.C. § 402(e)(1)(A), and 42 U.S.C. § 402(e)(4) is constitutional as a rational step by step approach to remedying the problem of the remarriage rule.[5]

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[5] Plaintiff cites and relies heavily for her rational basis argument on *Evans* v. *Harris*, Unemp. Ins. Rptr. (CCH) ¶ 14,296 (D. Utah 1981). The *Evans* court found Social Security Act provisions relating to widow's insurance benefits irrational. Under the statutory scheme, a woman validly married, then divorced, could receive benefits and a woman who was in good faith, but invalidly married could receive benefits, but a woman who was in good faith but invalidly married, *then divorced*, could not. The

III. CONCLUSION

The statutory distinction between widows and surviving divorced spouses of which plaintiff complains does not involve invidious discrimination nor does it so impinge upon the fundamental right of marriage as to warrant strict scrutiny. Thus the distinction need only be supported by a rational basis. This may be supplied by a one step at a time congressional approach to eliminating the hardships of the remarriage rule.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

(1) Defendant's motion for summary judgment is GRANTED, and

(2) Plaintiff's motion for summary judgment is DENIED.

DATED: DEC. 23, 1983.

/S/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

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court stated that the government had offered no explanation for the distinction between these groups of women and found that the distinction served neither to encourage valid marriages nor discourage divorce. The court found the statutory distinction irrational and violative of the equal protection component of due process.

Evans is distinguishable because there the court apparently was not presented and did not consider the one step at a time rationale considered and relied upon by the Court in this action.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS.

No. CV 84-154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL.,

[FILED AUG. 28, 1984]

ORDER CERTIFYING CLASS

In these consolidated class actions, plaintiffs challenge the constitutionality of certain provisions of the Social Security Act of 1977 which provide that, on remarriage, widowed spouses may receive survivors benefits but divorced surviving spouses may not.[1] The parties have stipulated to the facts as set out in earlier administrative proceedings and the only issue in the case is the constitutionality of the challenged provisions. Plaintiffs now move for class certification under Fed. R. Civ. P. 23(c)(1).

I. FACTUAL BACKGROUND

Plaintiff Buenta M. Owens was divorced from Russell B. Judd, her husband of more than 30 years, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on

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[1] These provisions shall be referred to as the "remarriage rule."

June 19, 1982. Thereafter, plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Plaintiff sought reconsideration but the Department again denied plaintiff's application on the same grounds.

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act ... Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcript of Administrative Proceedings at 2, ¶ C.

Plaintiff, Kenneth R. Owens, was divorced from Dorothy L. Owens, his wife of more than 34 years, in 1978. He married plaintiff, Buenta Owens (then Buenta Judd) in 1978 when he was 60 years old. On July 15, 1982, he applied for survivors benefits on the account of his first wife, who had since died. His claim was denied on the ground that plaintiff was married at the time of his application.

Mr. Owens requested reconsideration of the decision, which was denied on May 12, 1983. The Secretary and Mr. Owens thereafter entered into an agreement on November 23, 1983 stating that except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act, the provisions which are challenged by Mr. Owens in this action, Mr. Owens had established his right to survivors' benefits. The agreement also waived further administrative appeals.

Plaintiffs brought separate class actions under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976). Mrs. Owens seeks a declaration that former sections 202(e)(4) and 202(e)(1)(A) of the Act, the sections that distinguish between widows and surviving divorced wives on remarriage, are unconstitutional and that she remains entitled to benefits despite her remarriage.[2] Mr. Owens seeks a declaration that

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[2] In 1983, Congress made further revisions to the Social Security Act and eliminated the discriminatory impact of the remarriage rule upon sur-

former sections 202(f)(1)(A) and 202(f)(5), which provide a similar distinction between surviving divorced and widowed husbands on remarriage, are unconstitutional and that he is entitled to benefits. Plaintiffs allege that the challenged provisions violate the Fifth Amendment to the Constitution because they impermissibly impinge on the fundamental right to marry and because there is no rational basis for the distinction between divorced surviving spouses and widowed spouses on remarriage. Plaintiffs seek to enjoin the Secretary from denying benefits to surviving divorced spouses who remarry at age 60 or older and an order mandating payment of benefits previously denied and continuation of those benefits into the future. The cases have been consolidated.

Plaintiffs now move for certification of the following class:

> "All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) upon an application filed in accordance with the time frames described in Pub.L.No. 95-216, § 336(c)(1) and (2), have been or will be denied survivors' benefits as surviving divorced spouses, for any month after December 1978."

Mr. and Mrs. Owens are to serve as the name plaintiffs for the class.

II. DISCUSSION

A. Section 405(g)

These actions are brought under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which provides for judicial review of the Secretary's denial of a claim for benefits. To be certified, all members of the proposed class must satisfy the requirements for judicial review set out in section

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viving divorced spouses. Congress enacted amendments effective January 1, 1984, allowing surviving divorced spouses 60 or older to retain their benefits upon remarriage in the same fashion as widows or widowers. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 92 (1983). Thus, under current law, *both* widowed spouses and surviving divorced spouses, aged 60 and above, retain their benefits upon remarriage. 42 U.S.C.A. § 402(e)(3) (West 1983).

405(g).[3] *E.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975).

Section 405(g) specifies three prerequisites to judicial review in district court. First, there must be a final decision of the Secretary made after a hearing. *Salfi*, 422 U.S. at 763. This requirement has two elements: presentation of the claim to the Secretary (presentation) and a final decision by the Secretary after a hearing (exhaustion). *Mathews* v. *Eldridge*, 424 U.S. 319, 327 (1976). Second, the civil action must be commenced within 60 days after the mailing of notice of the Secretary's decision (60-day rule). *Salfi*, 422 U.S. at 763. Third, the action must be filed in the appropriate district, generally the plaintiff's residence or principal place of business (venue). *Id.* at 764. The Court must consider whether these requirements are satisfied or have been waived with regard to the proposed class.

(1) Presentation

The presentation requirement is simply the requirement that a claim for benefits be presented to the Secretary. *Mathews* v. *Eldridge*, 424 U.S. at 328. It is the only purely jurisdictional element of section 405(g) and cannot be waived. *Id.*

In this case, the presentation requirement has been satisfied by all class members who have applied for benefits as a surviving spouse. This includes all members of the proposed class except future applicants for such benefits. Such potential applicants cannot be in the class. *Salfi*, 422 U.S. at 764; *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Paskel* v. *Heckler*, 99 F.R.D. 80, 83 (E.D. Pa. 1983).

(2) Exhaustion

Section 405(g) provides that before bringing suit in district court, a claimant must have received a final decision from

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[3] Plaintiffs also assert jurisdiction under the Mandamus Act, 28 U.S.C. § 1361. However, the Supreme Court has recently held that this section does not provide an independent source of subject matter jurisdiction in a case that can be brought under section 405(g). *Heckler* v. *Ringer*, 104 S. Ct. 2013 (1984). Thus, section 405(g) is the only source of jurisdiction over these actions.

the Secretary after a hearing. This requirement is not jurisdictional and may be waived by the Secretary, *Salfi*, 422 U.S. at 764, or, in certain circumstances, by the court. *Eldridge*, 424 U.S. at 330; *Lopez* v. *Heckler*, 725 F.2d 1489, 1501 (9th Cir. 1984).

The Social Security Act does not define what constitutes a final decision of the Secretary made after a hearing. Rather, the meaning of these terms is left for the Secretary to flesh out by regulation. *Salfi*, 422 U.S. at 766. *See* 42 U.S.C. § 405(a). The Secretary may find that in certain cases full exhaustion of administrative procedures is not necessary for finality under section 405(g) and may thus waive the exhaustion requirement. *Salfi*, 422 U.S. at 767.

The Secretary has promulgated regulations waiving the exhaustion requirement in certain cases. "She has provided by regulation that when the facts and her interpretation of the law are not in dispute and when the only factor precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional, the claimant need not exhaust his administrative remedies beyond the reconsideration stage. 42 C.F.R. §§ 405.718-718e (1982); 20 C.F.R. §§ 404.923-404.928 (1983)." *Heckler* v. *Ringer*, 104 S. Ct. 2013, 2017 n.2 (1984).

These regulations are clearly applicable to this case. Members of the class would be eligible for benefits but for the operation of the remarriage rule. The facts of their claims are not in dispute[4] and neither is the Secretary's interpretation

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[4] The Secretary argues that in this type of case the facts may be in dispute because a claimant could change his or her application and contend that he or she was not actually remarried. It is also argued that the question of whether there has been a remarriage is particularly within the Secretary's competence. The Court finds that the Secretary's argument has no merit. To suggest that an applicant will change his contention of being remarried upon the denial of benefits is speculative and unlikely.

In *Saifi*, the issue of whether a marriage had actually occured would also have been relevant to whether the claimants in that case could claim benefits, yet the Supreme Court held that there were no factual issues presented to the Secretary. 422 U.S. at 756-757. Also, the Court finds no reason to believe that the question of whether a remarriage is legal is a matter "particularly within the Secretary's competence." *Cf. Ringer*, 104 S. Ct. at 2024 n.11 (question of coverage for surgery lies peculiarly in Secretary's competence).

of the remarriage rule. Thus, under the Secretary's own regulations, the exhaustion requirement is waived.

Further, in the circumstances of this case, the exhaustion requirement may be waived by the Court. In *Matthews* v. *Eldridge*, the Supreme Court recognized that certain cases may arise "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." 424 U.S. at 330. In *Salfi*, the Court also noted that in some cases, requiring exhaustion of administrative remedies would be futile and wasteful:

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefits of its experience and expertise, and to compile a record which is adequate for judicial review ... Plainly these purposes have been served once the Secretary has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. *Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the Secretary's needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by an administrative or judicial interest.*

422 U.S. at 765-66 (emphasis supplied). *See also Califano* v. *Sanders*, 430 U.S. 99, 109 (1977).

The Third Circuit has interpreted *Salfi* as establishing that if the only issue in a case is a legal issue of constitutionality, no exhaustion is required. *Kuehner* v. *Schweiker*, 717 F.2d 813, 817 (3rd Cir. 1983); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-46 (3rd Cir. 1977). In *Liberty Alliance*, the court also noted that while the discussion of the exhaustion requirement in *Salfi* involved the question of whether a single applicant had exhausted administrative remedies, the *Salfi* Court's concerns regarding waste of judicial resources apply equally to multiple claimants presenting an identical legal issue. 568 F.2d at 345.

This Court agrees with the Third Circuit[5] that no exhaustion of administrative remedies is required in this type of class action. The name plaintiffs have presented their claims to the Secretary and the Secretary's position on the constitutionality of the remarriage rule is clear and final. Thus, even if the Secretary had not waived the exhaustion requirement through her regulations, to require such exhaustion would be futile and serve no judicial or administrative interest.

(3) 60-Day Rule

Section 405(g) provides that a civil action for benefits must be filed within sixty days after receiving notice of an adverse decision by the Secretary. While this requirement is waivable, *Salfi*, 422 U.S. at 764, it has not been waived in this case. Plaintiffs contend, however, that the 60-day rule is not applicable to this type of case. The Secretary contends that the rule applies and bars certification of a class containing any members who received a final decision from the Secretary more than 60 days before the complaint was filed in these cases. The Court finds that neither party's interpretation of the application of the 60-day rule is entirely correct.

Plaintiffs contend that the Ninth Circuit's decision in *Lopez* v. *Heckler*, 725 F.2d 1489 (9th Cir. 1984) establishes that the 60-day rule does not apply to this case. *Lopez* involved the appeal of a preliminary injunction directing the Secretary to comply with certain Ninth Circuit decisions regarding termination of disability benefits. The plaintiff class in *Lopez* was not limited to persons who had complied with the 60-day rule.

On appeal, the Secretary challenged the application of the injunction to those persons not in compliance with the rule. While the court did not hold that the 60-day rule was inappli-

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[5] In *Lopez* v. *Heckler*, 725 F.2d 1489, 1506 (9th Cir. 1984), the Ninth Circuit also found exhaustion to be futile where the only issue in the case was a constitutional one. However, in *Lopez*, unlike this case, the constitutional claim was collateral to the substantive claim for benefits. *See* also *Eldridge*, *supra*. Thus, *Lopez* does not provide direct authority for waiving exhaustion in this case, although it generally supports waiver of exhaustion where resort to administrative remedies would be futile. 725 F.2d at 1506.

cable, the majority opinion[6] found that the plaintiffs had presented serious questions as to whether the 60-day rule applied to the case and therefore affirmed the injunction's application to all members of the class. 725 F.2d at 1504-07. The court expressed doubts as to whether Congress had intended to apply the 60-day rule to cases presenting substantial constitutional questions, *id.* at 1505, and further suggested that the Supreme Court decision in *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977) "may well compel a holding that the 60-day limitations period of section 405(g) does not apply to cases involving substantial constitutional questions collateral to a substantive claim for benefits" because a different interpretation would infringe on a claimant's constitutional right to be heard. *Id.* at 1506.

Plaintiffs contend that *Lopez* establishes the inapplicability of the 60-day rule to this case, in which the only issue presented is a substantial constitutional question. However, in this case, unlike *Lopez*, the constitutional question is not collateral to plaintiffs' claim for benefits, but rather lies at the heart of their claims. They will only receive benefits if the challenged distinction is unconstitutional. Further, in *Lopez* the Ninth Circuit did not hold that the 60-day rule is inapplicable in constitutional cases. The majority only found that plaintiffs had raised substantial questions on that issue supporting preliminary relief.

The Supreme Court has held that the 60-day rule may be waived by the Secretary, but the Court has never indicated that the 60-day rule does not apply in constitutional cases where it has not been waived. While the Court has stated that the exhaustion requirement may be judicially waived, and by its holdings has suggested that the venue requirement does not apply to all members of a plaintiff class, *see* Pt. A(4) *infra*, the Court's decisions do not suggest that the 60-day rule may be waived by the district courts.[7] *See*

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[6] Judge Boochever dissented from this portion of the decision, contending that the 60-day rule was applicable to the case. 725 F.2d at 1510-11 (Boochever, J., concurring).

[7] As discussed in the text, in *Lopez* the Ninth Circuit relied on *Califano* v. *Sanders* for the proposition that the 60-day rule should not apply. However, the statements in *Sanders* regarding the importance of providing a judicial forum for constitutional claims were made with regard to the deci-

Heckler v. *Lopez*, 104 S. Ct. 221, 222-23 (Stevens, J., concurring and dissenting); *Califano* v. *Yamasaki*, 442 U.S. at 701; *Salfi*, 422 at 764. Thus, the class must be limited to members who have complied with the 60-day rule.[8]

However, like all statutes of limitations, the 60-day limitation period is subject to tolling. The limitations period should be tolled for at least 60 days, prior to the filling of Mrs. Owens's complaint in this action. *See Heckler* v. *Lopez*, 104 S. Ct. at 224 & n.4 (Stevens, J.). Further, in this case, the limitations period should be tolled from filing of plaintiffs' administrative complaint. The section 405(g) action, in which a plaintiff is required to initially resort to administrative remedies, is analogous to actions brought under Title VII, which has a similar procedural scheme. *Lopez*, 725 F.2d at 1506. In Title VII class actions, the statute of limitations is tolled retroactively for all unnamed class members from the time the class representative files his administrative charge with the Equal Employment Opportunity Commission. *Lopez*, 725 F.2d at 1506; *citing Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975); *Williams* v. *Owens-Illinois, Inc.*, 665 F.2d 918, 923 (9th Cir.), *cert. denied*, 459 U.S. 971 (1982); *Inda* v. *United Air Lines, Inc.*, 565 F.2d 554, 559 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007 (1978). This rule applies even if the administrative charge was not filed on behalf of a class. *See Inda*, *supra*. The rationale for the rule is that when the issues are identical for all class

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sions in *Eldridge* and *Salfi* concerning the waiver of administrative remedies, not the application of the 60-day rule. 430 U.S. at 108-09.

[8] After the Ninth Circuit's decision in *Lopez*, the Supreme Court issued a partial stay of the decision. *Heckler* v. *Lopez*, 104 S. Ct. 2164 (1984). The terms of the partial stay suggest that a majority of the Court adopted Justice Stevens's earlier opinion in the case stating that the 60-day rule should apply. *See Heckler* v. *Lopez*, 104 S. Ct. 221, 223 (1983) (Stevens, J., concurring and dissenting). At this Court's request, the parties have briefed the question of how this partial stay should affect the applicability of the 60-day rule in this case. Because such a stay may issue on grounds other than a decision on the merits of the case, *see e.g.*, *Heckler* v. *Lopez*, 104 S. Ct. 10, 12 (Rehnquist, Circuit Justice 1983), and because the Supreme Court has indicated that its summary decisions do not bind lower courts except on the precise issue presented and necessarily decided in such decisions, *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), this Court's decision on the 60-day rule is not based on the partial stay in *Heckler* v. *Lopez*.

members, the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons. *Lopez*, 725 F.2d at 1507; *see also Kennedy* v. *Harris*, 87 F.R.D. 372, 377 (S.D. Cal. 1980). This rationale for the rule certainly applies here where there is only a single issue of law presented which affects the entire class in the same manner.

Mrs. Owens filed her motion for reconsideration in the administrative proceedings on October 19, 1982. This motion gave the Secretary notice of the constitutional claim and an opportunity to evaluate the effects of the claim on similarly situated people. Therefore, the 60-day period should be tolled as of that date. Thus, the class consists of those persons who applied for benefits on or after August 20, 1982, or who completed the administrative appeal process following a denial of such application on or after August 20, 1982.

(4) Venue

Section 405(g) provides that an individual challenging a decision of the Secretary in district court must bring any such action in the judicial district in which he or she resides or has his or her principal place of business. The Secretary urges that this venue requirement is jurisdictional and bars certification of a class containing any members who reside outside the Central District of California.

The Secretary's argument must be rejected in light of the Supreme Court's decisions in *Salfi* and *Califano* v. *Yamasaki*. In *Salfi*, the Court held that the venue requirement was not jurisdictional. 422 U.S. at 764. In *Yamasaki*, the Court found that nationwide classes could be certified in section 405(g) actions. 442 U.S. at 701. The court did not indicate that the venue provision of section 405(g) posed any obstacle to such nationwide certification.

The Secretary contends that the *Yamasaki* Court considered only policy arguments as to whether nationwide class actions brought under section 405(g) are desirable. Thus, the Secretary argues the Court did not consider the application of the venue requirement in *Yamasaki* and it still operates as a bar to certification of the proposed class.

Yamasaki may not be read as narrowly as the Secretary urges. In *Yamasaki*, the Court engaged in extensive analysis of whether class actions were certifiable under section 405(g), considering the terms of the statute and the intent of Congress. 442 U.S. at 698-704. After the Court considered the procedural requirements of section 405(g), it affirmed the certification of a nationwide class under the section. Given the Court's attention to the statutory requirements, it must be concluded that the Court could not have meant both that there could be nationwide classes *and* that the 405(g) venue requirement must be met for each member of the class. Rather, the Court implicitly held that the venue requirement was not a bar to such class actions.[9] *See also Lugo* v. *Heckler*, 98 F.R.D. 709, 713 (E.D. Pa. 1983) (rejecting the Secretary's venue argument in light of *Yamasaki*).[10]

Further, in *Yamasaki*, the Court held that section 405(g) class actions should be governed by the procedures of Fed. R. Civ. P. 23. 442 U.S. at 701. In class actions brought under Rule 23, only the residence of the named class members is considered in determining whether venue is proper in a particular district. *In re Gap Stores Securities Litigation*, 79 F.R.D. 283, 292 n.6 (N.D. Cal. 1978); *Research Corp.* v. *Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501 (N.D. Ill. 1969), *appeal dismissed sub nom Research Corp.* v. *Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970); 7 C. Wright and A. Miller, *Federal Practice and Procedure* § 1757 (1972). Since both name plaintiffs in the proposed class reside in the Central District of California, venue is proper in this Court.

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[9] Since the Supreme Court has treated the venue requirement as waivable and not jurisdictional, *see e.g.*, *Salfi*, *supra*, this holding in *Yamasaki* is not inconsistent with the Court's statement that the district court must have *jurisdiction* over each member of the class. 442 U.S. at 702.

[10] The Secretary's position on the venue requirement is further weakened by the fact that many lower courts have certified classes containing out-of-district class members. *See e.g.*, *Lopez* v. *Heckler*, 572 F. Supp. 26, 30-31 (C.D. Cal. 1983), *aff'd*, 725 F.2d 1489 (9th Cir. 1984); *Wright* v. *Califano*, 603 F.2d 666 (7th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Paskel* v. *Heckler*, 99 F.R.D. 80, 83-84 (E.D. Pa. 1983).

(5) Summary

The requirements of section 405(g) do not bar certification of a plaintiff class in this case. However, the proposed class must be modified in two respects. First, the class must include only those persons who have actually applied for benefits and thereby presented their claims to the Secretary. Second, the class may only include persons who applied for benefits on or after August 20, 1982 or who completed the administrative appeal process on or after August 20, 1982. The remaining issues before the Court are (1) whether the requirements of Fed. R. Civ. P. 23 have been satisfied; (2) whether 42 U.S.C. § 1303 bars class certification and (3) whether the class may be certified on a nationwide basis.

B. Rule 23

(1) Rule 23(a)

The four requirements of Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—are met in this case. The Secretary has indicated that over 100 persons would be in the proposed class. The joinder of this many persons would be impracticable and therefore the numerosity requirement is satisfied. There is a single issue of law in the case, the constitutionality of the remarriage rule, which is common to all class members, thereby satisfying the commonality requirement. The name plaintiffs' claims—the denial of benefits as a result of the allegedly unconstitutional statutory scheme—are typical of class members. Finally, plaintiffs can adequately represent the class. There is no potential conflict between them and other class members and plaintiffs' counsel are experienced in this type of litigation and can adequately represent the class. *See generally Jordan* v. *County of Los Angeles*, 669 F.2d 1311 (9th Cir.), *vacated on other grounds*, 103 S. Ct. 35 (1982).

(2) Rule 23(b)(2)

Plaintiffs have requested certification under section (b)(2) of Rule 23. Rule 23(b)(2) provides for class certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making

appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole."

Plaintiffs have requested a declaration that the challenged provisions are unconstitutional and seek an injunction against their application. The Secretary contends that nonetheless, this action is essentially a suit for damages—payment of lost benefits—and therefore certification under (b)(2) is inappropriate. The Secretary argues that the request for a declaratory judgment in this case does not itself make (b)(2) certification proper: the declaratory relief must correspond to injunctive relief, not merely be a substitute for damages. *See Pension* v. *Terminal Transport Co.*, 634 F.2d 989, 993 (5th Cir. 1981); *Sarafin* v. *Sears, Roebuck and Co.*, 446 F. Supp. 611, 615 (N.D. Ill. 1978).

However, an injunction against application of the challenged sections is necessary to afford the relief requested. Plaintiffs may receive Social Security benefits only under the terms of the Social Security Act. If the remarriage rule is not declared unconstitutional, the Secretary is obligated under the statute to deny any application for benefits. Thus, an injunction and declaratory judgment is required to enjoin the operation of a statutory scheme which in the absence of such an injunction would require a finding of ineligibility.

Plaintiffs' position is supported by many cases in which courts have enjoined provisions of the Social Security Act before ordering the payment of benefits. *See e.g.*, *Boles* v. *Califano*, 464 F. Supp. 408, 417-18 (W.D. Tex. 1978), *rev'd on other grounds sub nom Califano* v. *Boles*, 443 U.S. 282 (1979); *Diaz* v. *Weinberger*, 361 F. Supp. 1, 16 (S.D. Fla. 1973) (3-judge court), *rev'd on other grounds sub nom Mathews* v. *Diaz*, 426 U.S. 67 (1976).

Plaintiffs' position is further supported by the decision in *Califano* v. *Yamasaki*. There, the plaintiffs sought an injunction ordering the Secretary to hold a hearing prior to any attempt to recoup benefits allegedly erroneously paid out. The Secretary argued that an injunction was unnecessary because the Court could simply reverse the Secretary's decision to not hold such a hearing. The Court disagreed and held that the district court had the power to issue an injunction, noting that an injunction was necessary to protect the

rights of class members and prevent repetitive litigation. 442 U.S. at 705-06. Such concerns are clearly present in this case.

Finally, plaintiff has shown another basis for the issuance of injunctive relief: plaintiffs' right to equal treatment under the laws. In *Heckler* v. *Mathews*, 104 S. Ct. 1387 (1984), plaintiff challenged certain provisions of the Social Security Act as being based on an unconstitutional gender-based classification. The Secretary argued that plaintiff had no standing to request an injunction against the statute because he could receive no benefits. The Court disagreed, noting that even if no benefits could be paid out, plaintiff was entitled to receive a mandate of equal treatment under the laws. *Id.* at 1395. Thus, he had standing to seek an injunction against operation of the allegedly discriminatory statute.

This action similarly claims that the Social Security Act unconstitutionally provides for unequal treatment. As in *Mathews*, only injunctive or declaratory relief can provide plaintiffs with the mandate of equal treatment to which they claim they are entitled. Thus, both because plaintiffs would be entitled to such relief if they prevail and because an injunction is necessary to provide for the payment of benefits, the proposed class is properly certifiable under Rule 23(b)(2).

C. Section 1303

The Secretary finally argues that 42 U.S.C. § 1303 prohibits its class certification. This section provides that "[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby." The Secretary argues that absent class members constitute "other persons" under section 1303 and therefore any decision by this court cannot apply to them. The Secretary cites no case support for this proposition.

On its face, section 1303 does not bar class actions; indeed it is silent about class certification. The statute simply provides that a court may only hold certain provisions of Title 42 of the United States Code invalid as to the parties before

the court. In a properly certified class action, all class members should be considered before the court. Therefore, they are not "other persons" under the statute and section 1303 does not prevent the judgment in a class action to apply to them.

Further, the Secretary's interpretation of section 1303 is inconsistent with Congressional intent. The Supreme Court has described section 1303 as a "strong severability clause" which "evidences a congressional intent to minimize the burdens imposed by a declaration of unconstitutionality upon innocent recipients of government largess." *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979). The intent of the section is to prevent the denial of benefits to absent parties, not to prevent class actions seeking extension of benefits to members of a class allegedly unconstitutionally excluded from receiving such benefits. *See Cimaglia* v. *Schweiker*, 555 F. Supp. 710, 713 (S.D. Fla. 1983).

Finally, it is necessary to consider the consequences of the Secretary's interpretation of section 1303. Section 1303 applies to all of Chapter 7 of Title 42 of the United States Code which includes not only the Social Security Old Age and Disability Program, but also Medicaid, Aid to Families with Dependent Children, Supplemental Security Income and other federal benefit programs. If the Secretary's interpretation is correct, the Supreme Court and lower courts have over the years incorrectly certified classes in the many actions brought in these areas. Given the lack of support for the Secretary's interpretation of both the language and intent of the statute, the Court declines to make such a drastic holding.

D. Scope of the Class

The Court must finally decide if the proposed class should be certified on a nationwide basis. This decision is committed to the discretion of the Court. *Yamasaki*, 442 U.S. at 703. In exercising its discretion, the court should consider whether there is ongoing litigation in other districts and whether the issues presented are such that it would be preferable to have them adjudicated by different courts in different factual contexts. *Id.* at 702.

Considering these factors, the Court finds that nationwide certification is appropriate in this case. The Court is not aware of any ongoing litigation in other districts involving the same issue. Further, the only issue presented in the case is the facial constitutionality of the challenged provisions of the Social Security Act. Thus, there is no possibility of different factual contexts arising which might affect the outcome of the questions presented. Finally, a nationwide class would provide the most efficient means of reaching a final resolution of the application of the remarriage rule to all persons affected by the rule. *See McClure* v. *Harris*, 503 F. Supp. 409, 413 (N.D. Cal. 1980), *rev'd on other grounds*, 102 S. Ct. 1665 (1982). For these reasons, the Court finds that the class should be certified on a nationwide basis.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for class certification is GRANTED and the named plaintiffs Buenta Owens and Kenneth Owens shall represent the following class:

> "All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons applied for such benefits on or after August 20, 1982 or completed the administrative appeal process following a denial of such application on or after August 20, 1982.

DATED: AUG. 28, 1984

/S/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS.

[Filed Oct. 5, 1984]

ORDER

Having heard and considered the arguments of the parties, the Court now GRANTS plaintiff's motion for reconsideration of the December 23, 1983 final order in this action.

The Court finds that plaintiff is correct in arguing that the distinction between widows and surviving divorced wives drawn by former section 202(e)(4) of the Social Security Act, 91 Stat. 1509, 1547 (1977), must be supported by an independent rational basis. The statute may not be upheld on the sole basis that Congress could take one step at a time in eliminating the hardships of the remarriage rule, former section 202(e)(1)(A) of the Act, 79 Stat. 286, 376-77 (1965). Rather, the Court must also find a rational basis for the particular step Congress chose to take. Because the final order filed December 23, 1983 was based, in part, on an error of law, IT IS HEREBY VACATED. The Court now enters a revised order.

DATED: September 27, 1984

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS

CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL., DEFENDANTS.

[Filed Oct 5, 1984]

ORDER

In these consolidated actions plaintiffs challenge the constitutionality of those portions of Title II of the Social Security Act of 1977 (Act) which provides that widowed spouses aged 60 and over may remarry and retain their survivors' benefits under the Act while surviving divorced spouses of that age lose their benefits if they remarry.[1] Both parties

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[1] For the purposes of clarity, the Court will refer to the challenged statutory provisions by their original section designations in the uncodified Social Security Act. *See* Social Security Amendments of 1977, Pub. L. No. 95-216. The successor provisions to the sections challenged here are codified at 42 U.S.C.A. §§ 402(e)(3) and 402(f)(4) (West 1983). As challenged here, former section 202(e) provides, in pertinent part, that:

> (1) The widow . . . and every surviving divorced wife . . . of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
> (A) is not married,
> (B)(i) has attained age 60, . . .
> shall be entitled to a widow's insurance benefit for each month . . .

have stipulated to the facts as set out in earlier administrative proceedings. The Court has previously certified a class of "all persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982." Each side now moves for summary judgment.

I. FACTUAL BACKGROUND

Plaintiff Buenta M. Owens was divorced from her husband of more than 30 years, Russell B. Judd, in 1968. In 1978, at the age of 61, plaintiff married Kenneth R. Owens, her present husband. Her former husband, Mr. Judd, died on June 19, 1982. Thereafter, the plaintiff applied for social security benefits on Mr. Judd's account.

The Department of Health and Human Services denied plaintiff's application on the ground that plaintiff was married at the time of her application. Mrs. Owens sought reconsideration; the Department again denied her application because of her remarriage.

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(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

Former section 202(f) provides, in pertinent part, that:

(1) The widower . . . of an individual who died a fully insured individual, if such widower—(A) has not remarried, (B)(i) has attained age 60 . . . shall be entitled to a widower's insurance benefit . . .

(5) If a widower, after attaining age 60, marries, such marriage shall, for purpose of paragraph (1) be deemed not to have occurred. 42 U.S.C.A. §§ 402(e), (f) (West 1974 & Supp. 1983).

The parties then pursued an expedited appeal process. They agreed that the sole issue in dispute is "the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act ... Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits." Transcripts of Administrative Proceedings at 2.

Plaintiff Kenneth R. Owens was divorced from Dorothy L. Owens, his wife of more than 34 years, in 1978. He married Buenta Owens (then Buenta Judd) in 1978 when he was 60 years old. On July 15, 1982, he applied for survivors' benefits on the account of his first wife, who had since died. His claim was denied on the ground that plaintiff was married at the time of his application. Mr. Owens requested reconsideration of the decision; reconsideration was denied on May 12, 1983. The Secretary and Mr. Owens thereafter entered into an agreement on November 23, 1983 stating that except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act, the provisions which are challenged by Mr. Owens in this action, Mr. Owens had established his right to survivors' benefits. The agreement also waived further administrative appeals.

Plaintiffs bring suit under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 (1976), seeking a declaration that former section 202(e)(4) and 202(f)(5) are unconstitutional and that plaintiffs remain entitled to benefits despite their remarriage. Plaintiffs further seek an injunction preventing defendant from denying benefits to surviving divorced spouses who remarry at age 60 or older, an order mandating that defendant pay plaintiffs those benefits previously denied, and to continue those benefits into the future.[2]

II. DISCUSSION

A. The Legislative Scheme and History

Congress passed the Social Security Act in 1935, thereby providing benefits for qualified wage earners. Pub. L. No.

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[2] The marriage restrictions applied to wives, 53 Stat. at 1364, § 202(b)(1); children, 53 Stat. at 1364, § 202(c)(1); widows, 53 Stat. at 1365, § 202(d)(1)(A); and parents, 53 Stat. at 1366, § 202(f)(1).

74-271, 49 Stat. 620, 622-24 (1935). Secondary benefits, those for wives, children, widows and parents—persons presumed to be dependent upon the primary wage earner—were provided in the Social Security Act Amendments of 1939. Pub. L. No. 76-379, 53 Stat. 1360, 1364-66 (1939). Under the Act at that time, secondary beneficiaries lost their benefits upon change in their marital status.[3] This provision has become known as the general marriage rule. The rule included a provision, embodied in section 202(e)(1)(A), that entitled widows would lose their survivors' benefits upon remarriage. 53 Stat. at 1365. The Court will refer to this portion of the general marriage rule as the remarriage rule.

In 1950, Congress amended the Act to provide for survivors' benefits for widowers. Pub. L. No. 81-734, 64 Stat. 483, 485 (1950). The provision, embodied in section 202(f), was identical to that for widows except that widowers received benefits only if they previously received at least half of their support from their wife. *Id.* The Supreme Court later struck down the requirement of one half support as to widowers, finding that it discriminated according to sex in violation of the equal protection component of the due process clause of the fifth amendment. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977).

In 1958, Congress enacted the first exceptions to the remarriage rule, providing that if entitled widows or widowers married individuals also entitled to benefits under the Act, the widows or widowers would not lose their benefits. Pub. L. No. 85-840, 72 Stat. 1013, 1031 (1958). In 1965, Congress expanded the category of persons receiving survivors' benefits to include surviving divorced wives. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286, 276 [*sic*] (1965). Surviving divorced wives were subject to the remarriage rule of section 202(e)(1)(A). *Id.*

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[3] The original bill also extended survivors benefits to surviving divorced husbands on the same basis as surviving divorced wives. H. Rep. No. 702 Part 1, 95th Cong., 1st Sess. 91-92, *reprinted in* 1977 U.S.Code Cong. & Ad. News 4155, 4248-4249. The Senate version did not include this change and it was not enacted into law. *See* H. Rep. 702, Part II, 95th Cong., 1st Sess. 73, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4291, 4319.

In 1977, Congress effectively eliminated the remarriage rule for widows and widowers by amending sections 202(e)(5) and 202(f)(5). Social Security Amendments of 1977 Pub. L. No. 95-216, 91 Stat. 1509, 1547 (1977). These sections provide that for widows and widowers who remarry at 60 or older, the remarriage rule, as enacted in sections 202(e)(1)(A) and 202(f)(1)(A) does not apply.

Congress did not provide for benefits for surviving divorced husbands as it did for surviving divorced wives. In 1980, this distinction between surviving divorced wives and husbands was found unconstitutional as an impermissible gender classification violating equal protection. *Ambrose* v. *Califano*, Unemp. Ins. Rep. (CCH) ¶ 17,702 (D.O. July 16, 1980). By court order, benefits were extended to surviving divorced husbands on the same basis they were afforded to surviving divorced wives. *Id.* The Secretary promulgated new regulations to this effect. 20 C.F.R. § 404.336 (1982). Thus, for the purpose of this action, the provisions relating to widowed and surviving divorced spouses are identical for men and women. *See* 20 C.F.R. §§ 404.335, 404.336 (1982).

When the 1977 amendments to the Act were first introduced in the House of Representatives, the proposed legislation included broad changes in the general marriage rule, including elimination of the remarriage rule for *both* widowed spouses and surviving divorced spouses aged 60 and above. The Senate, however, removed that portion of the bill which eliminated the remarriage rule for surviving divorced spouses.[4]

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[4] The only substantive discussion of the marriage rule changes is found in the original House report, which stated:

> Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first husband's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.

The Senate's version was enacted into law. 91 Stat. 1509, 1547 (1977).

The legislative history on the 1977 amendments relating to the remarriage rule is sparse. The House report on the original version noted that it proposed an across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widowed spouses and surviving divorced spouses.[5] The report stated that in the first year of operation, this broad change would create an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits. H. Rep. No. 702, Part 1, 95th Cong., 1st Sess. 47-48, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4155, 4204-05. No cost breakdown was given for the change in the remarriage rule. The later House conference report notes the Senate's deletion of the remarriage rule exemption for surviving divorced spouses but offers no explanation for the deletion. H. Rep. No. 702, Part II, 95th Cong., 1st Sess. 73 *reprinted in* 1977 U.S. Code Cong. & Ad. News 4291, 4319.

In 1983, Congress made further revisions to the Act and eliminated the discriminatory impact of the remarriage rule upon surviving divorced spouses. Congress enacted amendments allowing surviving divorced husbands and wives, 60

> Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts.
>
> Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse (including those with an entitled child in their case), parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits.

H. Rep. No. 702, Part I, 95th Cong., 1st Sess. 47-48 *reprinted in* 1977 U.S. Cong. & Ad. News 4155, 4204-05.

[5] A budgetary report on the 1983 amendments, which eliminate the widowed spouse-surviving divorced spouse distinction suggests that the reform of the remarriage rule may not have been a great contributor to this cost. The change allowing remarriage for surviving divorced spouses as well as widows after age 59, was estimated to cost less than $50 million a year and to have a "negligible" long term fiscal impact. S. Rep. No. 23, 98th Cong., 1st Sess. 17, *reprinted in* 1983 U.S. Code Cong. & Ad. News, 143, 157-58.

or older to retain their benefits upon remarriage in the same fashion as widowed spouses. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, 92 (1983). Thus, under current law, *both* widowed spouses and surviving divorced spouses, 60 and above, retain their benefits upon remarriage. 42 U.S.C.A. §§ 402(e)(3), (f)(4) (West 1983).

The legislative history of the 1983 amendment of the remarriage rule is no more revealing than that of the 1977 amendment. In the House, Senate and House conference reports, it was noted that the change in sections (e)(4) and (f)(5) would bring the treatment of surviving divorced spouses who remarry after attaining age 60 into line with that of their widowed counterparts. No explanation was offered for the original distinction between the two groups. H. Rep. 25, 98th Cong., 1st Sess. 56-57, *reprinted in* 1983 U.S. Code Cong. & Ad. News 219, 223, 275-76; S. Rep. No. 23, 98th Cong. 1st Sess. 16-17, *reprinted in* 1983 U.S. Code Cong. & Ad. News 143, 147, 157-58; H. Cong. Rep. No. 47, 98th Cong., 1st Sess. 129, *reprinted in* 1983 U.S. Code Cong & Ad. News 404, 419.

B. The Standard of Review

Plaintiffs argue that the challenged statutory distinction between surviving divorced and widowed spouses operates as a strong disincentive to marriage and thus infringes their fundamental right to marry under the equal protection portion of the fifth amendment's due process clause. If a fundamental right is infringed, strict scrutiny must apply. The state must have a compelling interest in the regulation and the regulation must be narrowly drawn to effectuate that interest. *E.g.*, *Carey* v. *Population Services International*, 431 U.S. 678, 686 (1977). Defendant responds that the statute's indirect effect on marriage is insufficient to constitute a fundamental right infringement and thus the rational basis test should be applied. Under this test, a regulation is constitutional if it is rationally related to a legitimate state interest. *E.g.*, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40-44 (1973).

The Supreme Court has recognized that the right to marry is fundamental and its infringement by the state is subject to

strict scrutiny. *E.g.*, *Zablocki* v. *Redhail*, 434 U.S. 374, 384-86 (1978); *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967). However, only serious infringements of the right trigger strict scrutiny. In *Zablocki*, the Court stated:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

434 U.S. at 386.

The Court has only applied strict scrutiny when the challenged state action created substantial legal obstacles to entry into or exit from the marital state. In *Zablocki*, for example, the Court struck down a state law which mandated that persons who had children to whom they owed a court-mandated obligation of support were required to prove, before being permitted to marry, that their children were not then, and never would become, public charges. *See also Boddie* v. *Connecticut*, 401 U.S. 371 (1971) (violation of due process for state to require indigents to pay filing fees in order to obtain divorce); *Loving* v. *Virginia*, *supra*, (state law banning marriages between persons of different race).

By contrast, in two recent cases involving challenges to marital classifications in the Social Security Act, the Court applied the rational basis test. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), plaintiff challenged as unconstitutional under equal protection a provision which allowed a married woman under 62 with a dependent child to receive benefits if her husband retired or became disabled but allowed no benefits for a similarly situated divorcee whose former husband retired or became disabled. The Court found the statute constitutional, holding that in the expenditure of funds for the public welfare, "a government does not deny equal protection 'merely because the classsifications made by its laws are imperfect.'" 429 U.S. at 185 (citation omitted). Such laws need only have a rational basis to pass constitutional muster. *Id.*

Similarly, in *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court was faced with an equal protection challenge to a Social Security Act provision which allowed persons entitled to dependent child benefits to retain those benefits if they married others so entitled but terminated the benefits if they married an unentitled person. This provision also operated as a disincentive to marriage for some persons. The Court, however, applied rational basis analysis and upheld the statute. *Id.* at 158.

Plaintiff argues that the Act's exemptions for widowed but not surviving divorced spouses represents a significant interference with the right to marry. Plaintiff contends that the Act's disparate treatment of the two groups imposes strong disincentive to remarriage for surviving divorced spouses. Plaintiff may be correct; however, this disincentive, under the foregoing authority, does not rise to the level of significant interference with a fundamental right. Unlike the challenged provisions in Supreme Court cases applying strict scrutiny, sections 202(e)(4) and (f)(5) erect no direct legal obstacles to marriage—they simply make marriage most costly. *Cf. Zablocki*, 434 U.S. at 387; *Boddie*, 401 U.S. at 373, 381; *Loving*, 388 U.S. at 4-7. Like other Social Security Act provisions the Supreme Court has subjected to rational basis analysis, the sections challenged here utilize marriage simply as a means of categorizing potential beneficiaries. *See Jobst*, 434 U.S. at 50-54; *de Casto*, 429 U.S. at 181-85. Sections 202(e)(4) and (f)(5) therefore represent an incidental regulation of marriage and must meet only the rational basis test to pass constitutional scrutiny.

C. The Rational Basis Test Applied

The rational basis test requires that "legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.... As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred." *Schweiker* v. *Wilson*, 450 U.S. 221, 230, 235 (1981). Under the analysis, statutes are entitled to a strong presumption of

constitutionality. *de Castro*, 429 U.S. at 185. In applying the rational basis test, the Court need not ascertain the actual purpose of the statute. The Ninth Circuit has held:

> [A] court may hypothesize legislative purposes: "where there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision,' [citation omitted] because [the Supreme Court] has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179, 101 S. Ct. 453, 461, 66 L. Ed. 2d 368 (1980).

Brandwein v. *California Board of Osteopathic Examiners*, 708 F.2d 1466, 1471 (9th Cir. 1983). In order to find a statute constitutional under the rational basis test, a court need only determine that there is a "conceivable legitimate purpose which would justify the distinctions made in the state's regulatory scheme." *Id.* at 1471.

As noted above, the legislative history of the challenged provisions is silent on the reason for the disparate treatment of widowed and surviving divorced spouses with regard to remarriage after attaining the age of 60. Plaintiffs urge that the failure to extend the remarriage rule exemptions to surviving divorced spouses was not only unexplained at the time of passage but remains rationally inexplicable today. Defendant argues that Congress rationally could have distinguished between widowed spouses and surviving divorced spouses on the basis of their differing dependence on the primary wage earner. Defendant further urges that Congress' distinction represents the sort of "one step at a time" approach to problem-solving that the Supreme Court has often approved under rational basis analysis. *E.g.*, *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981).

1. One Step At A Time

The one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here. In 1977, Congress considered exempting both widowed and surviving divorced spouses from the remarriage rule but resolved only to exempt widows and widowers. Then in

1985, Congress decided to extend the relief to surviving divorced spouses.

As plaintiffs note, however, the fact that Congress moved one step at a time in its efforts to alleviate the hardships of the remarriage rule does not in and of itself provide a rational basis for the statutory distinction here. Congress must have a rational basis for each step it takes. In all cases where the Supreme Court has used the phrase "one step at a time," it has found an independent rational basis for initial legislative "step". *Schweiker* v. *Wilson*, 450 U.S. 221, 238 (1981) (rational for Congress to believe those already receiving primary federal aid in institutions are most needy and limit supplemental relief to them); *Califano* v. *Jobst*, 434 U.S. 47, 57-58 (1977) (rational to believe recipients of dependent child benefits who marry other recipients are more needy than recipients who marry persons not entitled to benefits); *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 487-91 (health considerations provide rational basis for state restrictions on who may fit eyeglasses and lenses).

Thus, the statutory distinction between widowed spouses and surviving divorced wives erected by former section 202(e)(4) and (f)(5) must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses.

The Supreme Court has recognized that the provision of secondary benefits under the Social Security Act is not part of a general welfare scheme based on individualized need, but an attempt to alleviate general problems of economic dependency by distributing benefits to those persons presumed to be dependent. "Instead of requiring individualized proof on case-by-case basis, Congress has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 53. Thus, a challenged provision must be examined with reference to the general rationale for the statutory criteria, not whether the individual situation of the plaintiff under the statute is rationally defensible.

Defendant points to the legislative history of Title II and argues that Congress has traditionally recognized a depend-

ency distinction between widowed and surviving divorced spouses. Originally, only widows received benefits, 53 Stat. 1360, 1365 (1939). In 1965, Congress extended benefits to surviving divorced wives, but provided that surviving divorced wives would have to demonstrate actual dependency upon the deceased wage earner where widows would not. Pub. L. No. 89-97, 79 Stat. 286, 376-77 (1965). That distinction between the two groups was eliminated in 1972. Pub. L. No. 92-603. 86 Stat. 1329, 1335 (1972).

Defendant further points to instances where the Supreme Court has approved as rational Congress' assumption that differences in marital status may imply differences in dependency. In *Mathews* v. *de Castro*, 429 U.S. 181 (1976), the Court found constitutional the distinction in the Social Security Act between *married* women under 62 who have both dependent children and retired or disabled husbands (they receive benefits) and *divorced* women under 62 with dependent children and retired or disabled ex-husbands (they receive no benefits). The Court found this distinction was rationally based on an assumption that married women are more dependent upon their husbands than divorcees upon their ex-husbands.

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means that they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married. The problems that a divorced wife may encounter when her former husband becomes old or disabled may well differ in kind and degree from those that a woman married to a retired or disabled husband must face. For instance, a divorced wife need not forego work in order to stay at home to care for her disabled husband. She may not feel the pinch of the extra expenses accompanying her former husband's old age or disability. In short, divorced couples typically live separate lives.

429 U.S. at 188-89.

Similarly, in *Califano* v. *Boles*, 443 U.S. 282 (1979), the Court held that Congress, in enacting the Social Security

Act, could rationally have assumed that unmarried mothers would be less dependent upon their husbands than married mothers. 443 U.S. at 293.

Defendant urges that the above authority establishes that Congress could rationally have assumed that divorced spouses are less dependent upon primary wage earners than those still married. Defendant further contends Congress might rationally believe this distinction continues after the death of the wage earner so that surviving divorced wives may be presumed less dependent than those who are widowed. The Court agrees. However, the challenged provisions do not comport with these assumptions. Under former sections 202(e)(4) and (f)(5), both widowed and surviving divorced spouses initially receive survivors' benefits. The scheme does not reflect any assumption of dependency difference between the two groups. Congress decided to treat the two groups identically upon death of the primary wage earner. Only upon remarriage does the groups' treatment diverge; widowed spouses retain their benefits but surviving divorced spouses lose theirs. Thus, in order to sustain the challenged provisions on the ground of an assumed dependency distinction, Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows.

Defendant has been unable to present a logical basis for this distinction and none is apparant to the Court. Common sense suggests that if any rational distinction was to be made between the two groups, it should be made at the outset, upon the death of the primary wage earner, not on later remarriage. Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be erased by marriage. This was the rationale behind the original marriage and remarriage rules enacted as part of the Social Security Act. As now challenged, however, former sections 202(e)(4) and (f)(5) lack any conceivable basis in fact and thus fail the rational basis test.

III. CONCLUSION

The former statutory distinction between widowed and surviving divorced spouses of which plaintiffs complain does not involve invidious discrimination, nor does it so impinge upon the fundamental right of marriage as to warrant strict scrutiny. Thus, the distinction need only be supported by a rational basis to be constitutional. The Court finds no rational basis, however, for Congress' decision to initially provide survivors' benefits for both widowed and surviving divorced spouses and then, on remarriage, to continue benefits to widowed spouses but disallow benefits to surviving divorced spouses. Former sections 202(e)(4) and 202(f)(5) of the Social Security Act are unconstitutional.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

(1) Plaintiffs' motion for summary judgment is GRANTED;

(2) Defendants' motion for summary judgment is DENIED.

DATED: OCT 4, 1984

/s/ Wm. Matthew Byrne
WM. MATTHEW BYRNE, JR.
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ETC., DEFENDANTS

CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, ET AL., DEFENDANT

[FILED DEC. 20, 1984]

JUDGMENT

The Court having previously certified a class of:

"All persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivors' benefits, as surviving divorced spouses, for any month after December, 1978, *provided that* such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982."

and the Court having filed an order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) Sections 202(e)(4) and (f)(5) of the Social Security Act, 42 U.S.C. §§ 402(e)(4), (f)(5) (1982), which denied, from 1979 through 1983, inclusive, survivors' benefits to surviving divorced wives and surviving divorced husbands who remarried at age 60 or thereafter, while widows and widowers who remarried at age 60 or thereafter remained entitled to survivors' benefits, violate the equal protection component of the due process clause of the Fifth Amendment and are declared invalid as in conflict with the Constitution.

(2) Defendant, her agents, and employees are enjoined from applying 42 U.S.C. sections 402(e)(4) and (f)(5) to deny survivors' benefits to otherwise eligible surviving divorced spouses who remarried at age 60 or thereafter, for any or all of the period from 1979 through 1983, inclusive.

(3) Defendant, her agents, and employees are enjoined from continuing to deny survivors' benefits to Buenta Owens and to Kenneth Owens for those parts of the 1979 through 1983 period in which they would have received survivors' benefits but for the application of the invalid provisions of the Social Security Act.

(4) Defendant, her agents, and employees shall, consistent with this Judgment, determine the entitlements to survivors' benefits and amounts thereof for named plaintiffs Buenta Owens and Kenneth Owens, retroactive from the dates on which their eligibilities should have been established had defendant not applied the invalid classificatory scheme, and shall take all reasonable steps to assure payment of any entitlement within sixty (60) days from the date of the entry of this Judgment.

(5) Defendant, her agents, and employees are enjoined from continuing to deny survivors' benefits to class members for all or part of the period from 1979 to 1983, inclusive, in which they were entitled to survivors' benefits as surviving divorced spouses but for the application of the invalid provisions of the Social Security Act.

(6) Defendant, her agents, and employees shall take all reasonable steps, within 120 days of the entry of this Judgment, to determine the entitlements to survivors' benefits, to calculate the amounts thereof, and to assure payment of said amounts to class members who applied prior to the date of the entry of this Judgment, retroactive from the respective dates on which their eligibilities should have been established had defendant not applied the invalid classificatory scheme (including benefits for all months of eligibility through the month prior to the month in which prospective benefits are paid, pursuant to paragraph 7 below).

(7) Consistent with this Judgment, for those class members whose entitlements have been determined pursuant to paragraph 6 above, defendant, her agents, and employees shall begin paying said class members the prospective benefits to which they are entitled beginning with the calendar month following the calendar month in which full retroactive benefits have been paid.

Dated: This 20th day of Dec, 1984.

/s/ Wm. Matthew Byrne, Jr.
WILLIAM MATTHEW BYRNE, JR.
United States District Judge

Approved As To Form:

NATIONAL SENIOR CITIZENS LAW CENTER

/s/ Gill Deford*
GILL DEFORD

Attorneys for Plaintiffs
*As per telephonic authorization
given 12/19/84

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney

Attorneys for Defendant

APPENDIX F

CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV 83-2436-WMB
CV 84-154-WMB

BUENTA OWENS, ET AL

v.

SEC. OF HEALTH & HUMAN SERVICES

KENNETH OWENS, ET AL

v.

SEC. OF HEALTH & HUMAN SERVICES

FEB. 6, 1985

Present:

Hon. Wm Matthew Bryne Jr, (Judge)
D. Hostith (Deputy Clerk)
Rosa Treibach (Court Reporter)

Attorneys Present for Plaintiffs:

Gill Deford
Neal Dudovitz

Attorneys Present For Defendants:

George Wu, AUSA

Proceedings. Plaintiffs' Motion for Sanctions
Defendant's Motion to Alter or Amend Judgment.

Counsel are present and the motions are argued to the Court. Both the motion for sanctions and the motion to alter or amend the judgment are denied.

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[FILED MAR. 7, 1985]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendant Margaret Heckler, Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this action on February 6, 1985.

The appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 7th day of March, 1985.

ROBERT C. BONNER
United States Attorney

FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney
Attorneys for Defendant

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 83-2436-WMB

BUENTA M. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

No. CV 84-0154-WMB

KENNETH R. OWENS, ET AL., PLAINTIFFS,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT.

[FILED MAR. 9, 1985]

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that the defendant Margaret Heckler, Secretary of Health and Human Services, hereby appeals to the Supreme Court of the United States from the final Order entered in this consolidated action on February 6, 1985.

The appeal is taken pursuant to 28 U.S.C. § 1252.

DATED: This 8th day of March, 1985.

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
/s/ George H. Wu
GEORGE H. WU
Assistant United States Attorney
Attorneys for Defendant

APPENDIX I

AGREEMENT

The Secretary of Health and Human Services, hereinafter called the Secretary, and Buenta M. Owens, hereinafter called the claimant, hereby agree in accordance with the provisions of chapter III of title 20 of the Code of Federal Regulations, part 404, section 404.923 through 404.928 to all of the following:

A. The claimant accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd, social security number 490-10-0181 (copy attached).

B. The claimant accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination, except as indicated in paragraph C below.

C. The sole issue in dispute is the application of section 202(e)(1)(A) and (e)(4) of the Social Security Act. Section 202(e)(1)(A) provides that the widow and every surviving divorced wife may receive survivors benefits if along with other requirements they are not married. Section 202(e)(4) modifies the non-marriage requirement in 202(e)(1)(A) it states that, "If a widow, after attaining age 60, marries, such marriage shall, for the purposes of paragraph (1), be deemed not to have occurred." Mrs. Owens contends that the provision is unconstitutional in that it permits a widow to remarry at age 60 or thereafter without affecting eligibility, but a surviving divorced wife who remarries at age 60 or thereafter is then ineligible for survivors benefits. This provision denies Mrs. Owens the right to receive surviving divorced wife's benefits because she remarried, even though such marriage occurred after she had attained age 60.

D. Except for the provisions of section 202(e)(1)(A) and (e)(4) of the Social Security Act, which have been challenged by the claimant as indicated in paragraph C of this agreement, the right of the claimant to benefits has been established by the claimant.

E. The above-referenced reconsideration determination represents the final decision of the Secretary with

respect to the claimant in accordance with section 202(g) of the Social Security Act.

F. This agreement constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeals process.

G. The claimant has 60 days following the date the agreement is signed by or on behalf of, the Secretary within which to file a civil action in a U.S. District Court pursuant to section 203(g) of the Social Security Act on the issue stated in paragraph C of this agreement.

Signed Buenta M. Owens
BUENTA M. OWENS
Claimant

Date: February 11, 1983

Secretary of Health and Human Services
Signed William F. Cooper

Deputy Director
Office of Insurance Programs, OOPP

Date: March 3, 1983

APPENDIX J

AGREEMENT

The Secretary of Health, and Human Services, hereinafter called the Secretary and Kenneth R. Owens, hereinafter call[ed] the claimant, hereby agree in accordance with the provisions of Chapter III of Title 20 of the Code of Federal Regulations, Part 404, sections 404.923 through 404.928 to all of the following:

A. The claimant accepts the factual determinations of the Secretary as contained in the reconsideration determination of May 12, 1983, on the wage record of Dorothy L. Owens, Social Security Number 568-20-9248 (copy attached).

B. The claimant accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination, except as indicated in paragraph C below.

C. The sole issue in dispute is the application of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act.

D. Except for the provisions of sections 202(f)(1)(A) and 202(f)(5) of the Social Security Act which have been challenged by the claimant as indicated in paragraph C of this agreement, the right of the claimant to surviving divorced husband's benefits has been established by the claimant.

E. The above-referenced reconsideration determination represents the final decision of the Secretary with respect to the claimant in accordance with section 205(g) of the Social Security Act.

F. This agreement constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining scope of the administrative appeals process.

G. The claimant has 60 full days following the date the agreement is signed by, or on behalf of, the Secretary within which to file a civil action in a U.S. District Court pursuant to section 205(g) of the Social Security Act on the issue stated in paragraph C of this agreement.

Signed Kenneth R. Owens
KENNETH R. OWENS
Claimant

Date October 27, 1983

Secretary of Health and Human Services
Signed James E. Forbus
Acting Deputy Associate Commissioner for Retirement and Survivors Insurance

Date: November 23, 1983

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 202(e) of the Social Security Act, as in effect when this action was filed and as codified at 42 U.S.C. 402(e), provided in relevant part:

> **Widow's insurance benefits**
>
> (1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
>
> (A) is not married,
>
> (B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (5),
>
> (C)(i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title, or
>
> (ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65, and
>
> (D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,
>
> shall be entitled to a widow's insurance benefit for each month,* * *.

* * * * *

(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

3. Section 202(f) of the Social Security Act, as in effect when this action and as codified at 42 U.S.C. 402(f), provided in relevant part:

Widower's insurance benefits

(1) The widower (as defined in section 416(g) of this title) of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of the title) which began before the end of the period specified in paragraph (6),

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title,

(D) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit for each month, * * *.

* * * * *

(5) If a widower after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

4. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides:

Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a

review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the

original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

5. Section 216(d) of the Social Security Act, as in effect when the action was filed and as codified at 42 U.S.C. 416(d), provided in relevant part:

Divorced wives; divorce

(1) The term "divorced wife" means a woman divorced from an individual, but only if she had been married to such individual for a period of 10 years immediately before the date the divorce became effective.

(2) The term "surviving divorced wife" means woman divorced from an individual who has died, but only if she had been married to the individual for a period of 10 years immediately before the date the divorce became effective.

* * * * *

(4) The terms "divorce" and "divorced" refer to a divorce a vinculo matrimonii.

Supreme Court, U.S.
FILED
AUG 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1905

In The

Supreme Court of the United States

October Term, 1984

MARGARET HECKLER, Secretary of Health and Human Services,

Appellant,

v.

BUENTA M. OWENS and KENNETH R. OWENS, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Appellees accept the Secretary's characterization of the appeal on the merits.

2. The Secretary's appeal on the class issue should be framed as follows: Whether the district court, in certifying a class, properly interpreted 42 U.S.C. § 405(g).

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No. 84-1905

In The

Supreme Court of the United States

October Term, 1984

MARGARET HECKLER, Secretary of Health and Human Services,

Appellant,

v.

BUENTA M. OWENS and KENNETH R. OWENS, on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

Appellees move the Court to affirm that portion of the appeal designated as Question 1, on the ground that the question is so unsubstantial as not to warrant further argument, especially in light of Congress' correction of the offending provisions.

Appellees move the Court to dismiss from its docket, and remand to the Court of Appeals, that portion of the appeal designated as Question 2, on the ground that, if the decision on the merits is summarily affirmed, the pendent appeal on the class issue should not be considered in the first instance by this Court under 28 U.S.C. § 1252.

OPINIONS BELOW

The district court's order certifying the class (Appendix to Secretary's Jurisdictional Statement (hereinafter, "Sec.App."), 13a-28a) is reported in the CCH Unemployment Insurance Reporter, at ¶ 16,050.

The district court's original decision on the merits, granting the Secretary's motion for summary judgment (Sec.App., 1a-12a), is unreported. On October 5, 1984, the district court granted plaintiffs' motion to alter or amend. (Sec.App. 29a.) It held the challenged provisions unconstitutional (Sec.App. 30a-43a) in an order reported in the CCH Unemployment Insurance Reporter, at ¶15,798. Judgment was entered on December 26, 1984 (Sec.App., 44a-46a), and is reported in the CCH Unemployment Insurance Reporter, at ¶15,893.

JURISDICTION

There is a factual error in the Secretary's statement of Jurisdiction. Her amended notice of appeal was filed on March 8, not March 9, 1985. See Jurisdictional Statement, at 1; Sec. App., 49a.

The Jurisdictional Statement was filed on June 5, 1985, and counsel received it on June 10, 1985. By order of the Clerk dated June 19, 1985, the time to file a responsive pleading was extended to August 9, 1985.

As will be more fully discussed herein, appellees (hereinafter, "plaintiffs") do not agree that the Court should exercise its jurisdiction over the Secretary's appeal on the class issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fifth Amendment and 42 U.S.C. §§ 402(e)(1)(A), (4), (f)(1)(A), (5), and 405(g) are reproduced in pertinent parts in the Secretary's Appendix to the Jurisdictional Statement, at 53a-57a.

—o—

STATEMENT OF THE CASE

In December, 1984, the district court entered a judgment in this previously certified class action holding certain provisions of the Social Security Act unconstitutional. Those provisions allowed surviving widowed spouses to continue to receive survivors' benefits on the accounts of their deceased wage-earning spouses if they remarried at age 60 or over, while their identically situated counterparts, surviving divorced spouses, were deprived of survivors' benefits if they remarried. The court's judgment had no impact on future applicants, as the scheme had been corrected by Congress in 1983, so that the effect of the declaratory and injunctive relief was solely to provide benefits to class members for part of the five-year period in which the unconstitutional provisions were in effect. Despite the inherently limited nature of this ruling, the Secretary chose to appeal, arguing that the district court was wrong on both the merits and on its class action determination.

A. THE STATUTORY SCHEME

1. The issue on the merits

The Social Security Act provides for payment of retirement and disability benefits to individuals fully insured under the Act, and also to their spouses, their divorced spouses, and certain of their survivors. This latter group, survivors, include widows and widowers, and also surviving divorced spouses, provided the marriage lasted for a statutorily set period of years. 42 U.S.C. §§ 402(e),(f), 416(d)(2),(5).

Since 1979, the entitlement of widows and widowers age 60 or over has been unaffected by remarriage. *Id.*, §§ 402(e)(4),(f)(5) (1983). Until January 1, 1984, however, surviving divorced spouses lost their survivors' benefits if they remarried at age 60 or over. *Id.*, §§ 402(e)(1)(A), (4), (f)(1)(A), (5) (1983). Effective on that date, the deprivation of survivors' benefits to surviving divorced spouses who remarried at age 60 or over was removed, so that they were then treated identically with remarrying widows and widowers. See Pub.L. No. 98-21, §§ 131, 304, 97 Stat. 92, 93, 111, amending and redesignating 42 U.S.C. §§ 402(e)(3) and (f)(4).

When Congress was considering the legislation which ultimately ensured unreduced survivors' benefits upon remarriage for widows and widowers, Pub. L. No. 95-216, §§ 336(a)(3) and (b)(3), 91 Stat. 1547, amending 42 U.S.C. §§ 402(e)(4) and (f)(5), the House urged that survivors' benefits should likewise be continued for surviving divorced spouses who remarried. It was

> "concerned about the effect of [the marriage] provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recom-

> mended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts."

H.Rep. No. 95-702(I), 95th Cong., 1st Sess. 48 (1977), reprinted in [1977] U.S.Code Cong. & Admin. News 4155, 4205. In conference, however, it was decided to limit benefits for remarrying survivors to widows and widowers; there was no explanation for this decision to discriminate against divorced survivors. See H.Conf.Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977), reprinted in [1977] U.S. Code Cong. & Admin. News 4308, 4319. Accordingly, the 1977 amendments, which took effect on January 1, 1979, created the discrepancy between surviving widowed spouses and surviving divorced spouses, by treating them differently solely in the instance where a survivor remarried at age 60 or above.

2. Class certification in the context of 42 U.S.C. § 405(g)

A claimant for benefits under the Social Security Act is entitled to seek administrative review of an adverse decision. If still dissatisfied with the Secretary's determination, a claimant has the right to file a complaint for judicial review in the district court.

Under regulations issued by the Secretary, a claimant must initiate each stage of the administrative process within 60 days of the adverse prior decision which is being challenged. The Social Security Act, through 42 U.S.C. § 405(g), provides a statute of limitations of sixty days for the filing of the complaint in district court.

Rule 23 of the Federal Rules of Civil Procedure authorizes a district court to certify a case to proceed as a class action when the four requirements of Rule 23(a) are

satisfied and when one of the three provisions of Rule 23(b) is met. In *Califano v. Yamasaki*, 442 U.S. 682, 699-701 (1979), this Court expressly held that, where the requirements of Rule 23 are satisfied, class actions are certifiable in cases brought pursuant to § 405(g). Thus, as in any other class action, relief will flow to all class members in a successful challenge brought on behalf of a class of similarly situated claimants.

B. PROCEEDINGS IN THIS CASE

1. The merits

a. The named plaintiffs, Buenta and Kenneth Owens, were each married to their former spouses for well over twenty years before their divorces. In 1978, when she was 61 and he was 60, Buenta and Kenneth married each other. In July, 1982, after both of their former spouses had died, each applied for survivors' benefits on the wage records of those spouses. Because the challenged provisions did not provide for survivors' benefits to divorced surviving spouses who remarried, both claims were denied.

On October 19, 1982, Mrs. Owens sought reconsidera- of that determination, but that was also denied. Since the only issue was the constitutionality of 42 U.S.C. § 402(e)(4), she requested that further administrative review of her claim be waived. The Secretary granted that request on March 3, 1983 (Sec.App. 50a-51a), and on April 19, 1983, Mrs. Owens filed her complaint in district court.

Similarly, Mr. Owens also sought reconsideration, which was denied on May 12, 1983. He too sought waiver of the administrative process, which was granted on November 23, 1983. (Sec.App., 52a-53a.) He then filed a similar complaint in district court on January 6 ,1984, and the two cases were consolidated.

b. While plaintiff Buenta Owens was waiting for the Secretary to respond to an order compelling answers to interrogatories directed at the approximate size of the class, and while the Secretary was contemplating Mr. Owens' request for waiver of exhaustion, the Secretary filed a motion for summary judgment in Mrs. Owens' case. After plaintiff cross-moved, the district court entered judgment for the Secretary, on December 23, 1983. The court analyzed the scheme under the rational basis test, noting the broad deference which must be accorded a legislature under that analysis. (Sec.App., 7a-8a.) It considered

> "two conceivable bases for the statutory discrimination: 1) that Congress could have rationally distinguished between widows and surviving divorced spouses on the basis for [*sic*] their differing dependence on the primary wage earner, and 2) that Congress rationally could have decided to remedy the problems created by termination of benefits on remarriage one step at a time, extending benefits first to widows and later to surviving divorced spouses." (*Id.* at 8a).

The court first rejected the Secretary's contention that *Mathews v. de Castro*, 429 U.S. 181 (1976), resolved the issue of this case because of its recognition of varying dependency between divorced and non-divorced surviving spouses. It held that the distinction observed in *de Castro* "rested explicitly upon considerations of dependency during the lifetime of the primary wage earner and thus is inapplicable to the issue of widows' and surviving divorced spouses' dependence upon a now-deceased primary wage earner." (*Id.* at 9a.)

Judge Byrne noted the crucial factor which foreclosed the conclusion that Congress could rationally distinguish between widows and surviving divorced spouses:

> "Congress has allowed both groups benefits after the death of the primary wage earner. The only distinction between the groups comes after remarriage following death, not after divorce . . . . Congress is not implying that divorced persons are more likely to 'go their own way' after divorce—divorce does not trigger the critical distinction—remarriage does. In order to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*. No tenable basis for such a distinction has been presented, nor is one discernible to the Court." (*Id.* at 10a; emphasis in original.)

Notwithstanding its conclusion that there was no rational basis on which to distinguish the two classes, the district court found the scheme to be constitutional. It held that Congress could move "one step at a time" in extending benefits, even if the step which it took, as in this instance, was irrational. (*Id.* at 10a-11a.) As a practical matter, the court concluded that it was always rational for Congress to move forward gradually, regardless of the disparate treatment which resulted.

Mrs. Owens timely filed a Rule 59 motion, contending that the court's "one-step-at-a-time" analysis had misconstrued this Court's holdings. (See Sec.App., 10a-11a.)[1] On October 5, 1984, Judge Byrne acknowledged his error and granted the motion for reconsideration. (*Id.* at 29a.) In his order granting plaintiffs' motion for summary judgment (*id.* at 30a-43a), the judge again carefully reviewed

---

[1] In the meantime, Mr. Owens, whose complaint was filed shortly after the court ruled against Mrs. Owens, moved for summary judgment.

the history of the statutory scheme and its background, but made a key change in his analysis:

> "[T]he fact that Congress moved one step at a time in its efforts to alleviate the hardships of the remarriage rule does not in and of itself provide a rational basis for the statutory distinction here. *Congress must have a rational basis for each step it takes.*" (*Id.* at 40a; emphasis supplied.)

He then observed that in each of the three decisions of this Court on which he had relied to support his prior holding (see *id.* at 10a-11a), this Court had found "an independent rational basis" for the step in question. (*Id.* at 40a.)

The court then evaluated the rationality of the scheme in a manner similar to its previous analysis. Judge Byrne recognized again that "Congress decided to treat the two groups identically upon death of the primary wage earner." (*Id.* at 42a.) For the Secretary to prevail, therefore,

> "Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows." (*Id.* at 42a.)

With this premise in mind, the court concluded that the scheme was irrational:

> "Defendant has been unable to present a logical basis for this distinction and none is apparent to the Court. Common sense suggests that if any rational distinction was to be made between the two groups, it should be made at the outset, upon the death of the primary wage earner, not on later remarriage. Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be

erased by marriage. This was the rationale behind the original marriage and remarriage rules enacted as part of the Social Security Act. As now challenged, however, former sections 202(e) (4) and (f) (5) lack any conceivable basis in fact and thus fail the rational basis test." (*Id.* at 42a.)

On December 26, 1984, the Court entered judgment enjoining the challenged provisions. (*Id.* at 44a-46a.) The Secretary moved under Rule 59 to reconsider all aspects of the judgment, again arguing that Congress' gradual extension of survivors' benefits was *per se* rational and that the scheme did not violate the guarantees of equal protection. The motion was denied. (*Id.* at 47a.)

2. Class certification

Shortly before the district court's original ruling on the merits, the Secretary complied with the order compelling answers to interrogatories and stated that "approximately one hundred eighteen surviving divorced spouses who have remarried at age 60 or thereafter, and who meet all other eligibility requirements, were denied benefits between July 1, 1982 and June 30, 1983." Since this information demonstrated the impracticability of joinder, plaintiffs moved to certify a nationwide class, to consist of all those denied benefits during the five-year period in which the unconstitutional scheme had been in effect, January 1, 1979 through December 31, 1983, inclusive.

In its order of August 28, 1984 granting the motion, the district court held that the four components of Rule 23(a) were satisfied and that, as injunctive and declaratory relief for the class as a whole were appropriate, Rule 23(b) (2) was met. (*Id.* at 24a-26a.)

The court rejected most of the Secretary's arguments about the alleged effect of § 405(g) on certification. That provision, it held, did not forbid inclusion of individuals residing outside the judicial district in which the complaint was filed. (*Id.* at 22a-23a.) Furthermore, all class members had satisfied "the only purely jurisdictional element of section 405(g)", presentation of the claim. (*Id.* at 16a.)

The Secretary's contention that § 405(g) required each class member to exhaust was overruled, because, as this Court had held in *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975), and *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), it was not a jurisdictional requirement and therefore could be waived. (Sec.App., 17a.) Since the Secretary had not required exhaustion for the named plaintiffs under regulations expressly providing for waiver, the district court held that the Secretary had waived exhaustion for the class members. (*Id.* at 17a-18a.) In addition, since the only issue on the merits was the constitutionality of the challenged provisions, the court held in the alternative, following *Salfi* and *Eldridge*, that it should exercise its own authority to waive exhaustion: "[T]o require such exhaustion would be futile and serve no judicial or administrative interest." (*Id.* at 19a.)[2]

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[2] The district court's actual order of certification contained a technical error on the exhaustion issue. (See Sec.App.28a.) The original order limited the class in part to those who had "*completed the administrative appeal process* following a denial of such application on or after August 20, 1982." (Emphasis supplied.) Plaintiffs moved to eliminate this apparently unintentional exhaustion requirement, and the Secretary did not oppose the motion. Accordingly, on October 5, 1984, the district court entered an amended order which eliminated this error. (Appendix to Cross-Appellants' Jurisdictional Statement, *Owens v. Heckler*, No. 85-31 (docketed July 5, 1985), at 1a-2a; see also Sec.App., 44a.)

With respect to the Secretary's final argument under § 405(g), the court concluded that since the Secretary had not waived the 60-day requirement, the class would be limited to those who had satisfied that rule. (*Id.* at 21a.) But since, "like all statutes of limitations, the 60-day limitation period is subject to tolling," (*id.* at 21a), the court held that the period for filing was tolled. It set the tolling date as sixty days prior to the filing of Mrs. Owens' request for reconsideration, for "the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." (*Id.* at 22a.)

The district court thus defined the class to include all those who had live claims on or after August 20, 1982. While the class did not include everyone affected by the challenged provisions from 1979 through 1983, as plaintiffs had requested,[3] it did include claimants over whom, the Secretary had contended, the district court lacked jurisdiction.

After judgment was entered, the Secretary sought reconsideration of the court's class ruling as well. She raised the same arguments as in her opposition to the motion for class certification, and the district court rejected them again. (*Id.* at 47a.)

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[3] Plaintiffs have filed a cross-appeal on this aspect of the court's order. *Owens v. Heckler, supra,* No. 85-31.

THE QUESTIONS ARE NOT SUFFICIENTLY SUBSTANTIAL TO WARRANT PLENARY REVIEW, OR SHOULD BE DISMISSED

I. THE DISTRICT COURT'S CAREFUL ANALYSIS OF THE CHALLENGED PROVISIONS PROPERLY APPLIED THIS COURT'S PRECEDENT, AND, IN ANY EVENT, CONGRESS HAS CORRECTED THE UNCONSTITUTIONAL SCHEME

Congress determined that surviving spouses, both divorced and non-divorced, were entitled to survivors' benefits, thus recognizing that divorce was not relevant to the issue of survivors' benefits. Similarly, Congress determined that a surviving spouse who remarries should receive survivors' benefits, thus recognizing that remarriage has no bearing on entitlement to survivors' benefits. As a matter of fact, therefore, Congress concluded that neither divorce nor remarriage was a relevant factor in the award of survivors' benefits. Consequently, the district court was correct in holding that Congress could not rationally limit survivors' benefits solely to non-divorced surviving spouses who remarry. Its careful reviews of the scheme and the case law indicate that summary affirmance is the correct resolution of the pending appeal. This perception has been enhanced by this Court's recent application of the rational basis test to strike down a structurally similar scheme.

Moreover, the small size of the class in this case and the fact that the unconstitutional scheme has already been corrected also militate against plenary review. If thousands of claimants and many millions of dollars were at stake, this case would obviously take on greater importance. But not only is its immediate effect on the Social Security trust fund minuscule; it will have no prospective impact

whatsoever, as Congress has now corrected the challenged deficiency.

1. Under the rational basis test, a classificatory scheme must be judged by whether it "advances legitimate legislative goals in a rational fashion." *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981).[4] The standard, while frequently stated, is often ignored by the government, despite this Court's repeated admonition that it is "not a toothless one." See, *e.g.*, *Mathews v. Lucas*, 427 U.S. 495, 510 (1976).

The test requires consideration of two factors, not one: whether the legislative goal is legitimate, *and* whether the government rationally achieves that goal. The Secretary focuses on the first point, arguing that Congress had a valid purpose, which she broadly defines as the gradual liberalization of the remarriage rule. For the purpose of this argument, the validity of that position need not be considered. What definitively brands this scheme as irrational is the manner in which Congress sought to achieve its alleged goal.

The Secretary's argument fails because she can offer no reasoned explanation as to why remarriage presents different considerations for the two groups of surviving spouses, divorced and not divorced, when they were accorded identical treatment prior to remarriage. Instead, the Secretary repeatedly argues that "Congress rationally could determine that a divorced spouse in general would be

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[4] See also, e.g., *City of Cleburne, Texas v. Cleburne Living Center*, 53 U.S.L.W. 5022, 5023 (July 1, 1985); *Hooper v. Bernalillo County Assessor*, 53 U.S.L.W. 4827, 4830 (June 24, 1985); *U.S. Railroad Retirement Board v. Fritz*, 453 U.S. 166, 177 (1980).

less dependent upon the primary wage earner at the time of the latter's death than would a spouse who remained married to the wage earner until the time of his death." Jur.Statement, at 14-15. In making this contention, the Secretary appears to be relying on the general rule that the government may suggest any rationale in support of a scheme, even one produced only "by the ingenuity of a government lawyer . . . ." *Schweiker v. Wilson, supra,* 450 U.S., at 244 (Powell, J., dissenting).[5] But the government's freedom to devise a possible rationale on which Congress might have relied is not so extensive as to allow it to fashion after-the-fact reasoning on which Congress expressly did not rely.

Congress was not required to provide Social Security benefits to anyone, or to any survivors, or to any divorced spouses; it was not bound to provide them to surviving divorced spouses. But it did so, thus determining that surviving spouses were all equally entitled, regardless of the spouses' marital status at the deaths of the wage earners. The Secretary cannot, therefore, hypothesize as to what Congress might have determined about the relative dependencies of divorced and non-divorced surviving spouses, when Congress has expressly reached a contrary conclusion. Speculation on Congressional intent cannot support disparate treatment when, *in fact,* Congress concluded that the groups are indistinguishable.

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[5] See *Schweiker v. Wilson, supra,* 450 U.S., at 244-45 (Powell, J., dissenting) for a suggestion as to a more appropriate standard for reviewing these "*post hoc* hypotheses about legislative purpose, unsupported by the legislative history." See also *U.S. Railroad Retirement Board v. Fritz, supra,* 449 U.S., at 180-181 (Stevens, J., concurring in the judgment), cited in *City of Cleburne, Texas v. Cleburne Living Center, supra,* 53 U.S.L.W., at 5027 n.4 (Stevens, J., concurring).

Congress decided that divorce was irrelevant to the receipt of survivors' benefits . It also decided that remarriage was irrelevant to the receipt of survivors' benefits. With those points resolved, it was illogical to determine that divorce *became* relevant when the surviving spouse remarried, and the district court's conclusion on this point succinctly summarized the inadequacy of that contention. Judge Byrne stated that no "logical basis" existed "to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows . . . ." (Sec.App., 42a.)

As in the district court, the Secretary relies largely on this Court's rulings in *Mathews v. de Castro*, 429 U.S. 181 (1976), and *Califano v. Jobst*, 434 U.S. 47 (1977).[6] While those decisions do discuss divorce and remarriage as factors in the receipt of Social Security benefits, they are inapposite in this context.

The issue in *de Castro* was the constitutionality of a provision which provided benefits to a wife caring for a child if the husband became disabled or retired, while a divorced wife in the same situation was not eligible for those benefits. See 429 U.S., at 181-82. This Court upheld that differential treatment because "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." *Id.*, at 188. The Secretary argues that this holding resolves the issue of this

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[6] The Secretary boldly states that the district judge's "holding is foreclosed by this Court's decisions in *de Castro* . . . and *Jobst* . . . ." Jur. Statement, at 12.

case; her contention is that *de Castro* suports the differential treatment of divorced and non-divorced spouses in every instance. See Jur. Statement, at 14-15.

But the reasoning of *de Castro* is premised on the fact that the non-divorced wife needs the extra benefits to help with the burden of caring for a now-retired husband. See 429 U.S., at 188. It has no relevance to the survivor situation, where there is no spouse to care for. Moreover, as has been explained, Congress expressly determined that, in *this* context, the prior divorce is not a relevant consideration, for the death of the wage earner eliminated any differences in dependency between the divorced and non-divorced spouses. Contrary to the Secretary's position, *de Castro* does not stand for a *per se* rule that differential treatment between divorced and non-divorced individuals is invariably permissible.

In *Jobst*, this Court upheld a provision which required the termination of Social Security benefits when a dependent child married a non-recipient of benefits while a marriage between two beneficiaries would not affect eligibility. See 434 U.S., at 51. As with *de Castro*, the Secretary relies on this Court's observations — in this instance, the presumed effect of marriage on the recipient's dependency on his parents — to draw broad conclusions about the significance of marriage in general. Jur.Statement, at 13-14.

But again, the narrow context of that case does not permit its sweeping application to every situation in which a marriage occurs. In *this* case, once Congress had determined that divorced spouses were to be treated equally with their non-divorced counterparts upon the

death of the wage earner, it had resolved the issue. The Secretary is incapable of demonstrating how remarriage alters the dependency relationships between divorced surviving spouses and their deceased wage earners, while it has no effect on non-divorced spouses and their deceased wage earners. Remarriage simply has no bearing on the nature of those relationships. *Jobst* does not stand for the proposition that the event of remarriage automatically validates disparate treatment between classifications recognized as identical.

The Secretary's argument effectively amounts to that ultimately rejected by the district court, that Congress can always move one step at a time, regardless of the irrationality of a given step, because the long-range goal is legitimate. But a program which benefits some and not others must have a rational basis for that differential treatment. Once the legislature has determined that a particular classification is to be treated the same as another classification, it is not free to impose disparate treatment based on a factor unrelated to the classifications.

In a recent decision employing the rational basis test, this Court considered a scheme structurally similar to that here at issue and recognized that benefit programs must follow a rational progress in their development. *Hooper v. Bernalillo County Assessor*, 53 U.S.L.W. 4827 (June 24, 1985). Although Judge Byrne did not have the benefit of that discussion when he was reviewing the classificatory system in this case, his analysis closely parallels that of this Court.

In the *Hooper* situation, New Mexico decided to extend annual property tax exemptions to Vietnam veterans.

It limited the exemptions to resident veterans. It further limited them to "established" resident veterans, which it defined as those who had resided in the state before May 8, 1976. *Id.* at 4830.

This Court recognized that there were valid reasons to favor veterans over non-veterans, and to provide benefits to all resident veterans:

> "[T]he State may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor irrational distinction among its residents. Resident veterans, as a group, may well deserve preferential treatment, and such differential treatment vis-a-vis non-veterans does not offend the Equal Protection Clause."

Id. at 4836. But the distinction *among* resident veterans, based on date of residence, raised different considerations. The statute required no connection between prior residence and military service, and the effect was to discriminate against one group of resident veterans based on a factor which was unrelated to the overall purpose of the scheme. *Id.* at 4830.

The instant case describes a similar structure and raises many of the same considerations. New Mexico was free to extend benefits to all resident veterans, but it could not use an arbitrary date to distinguish within that class. Similarly, Congress was free to extend survivors' benefits to all surviving spouses, but it could not use the unrelated factor of a later remarriage to distinguish among survivors. In both instances, the legislatures' decisions to extend benefits were circumscribed by the requirement that they act rationally, so that the lines between favored and disfavored classifications were

logically premised on criteria relevant to the benefit program at issue.

2. The district court was therefore correct in finding the scheme constitutionally deficient. Summary affirmance on that ground alone is appropriate. But other factors also militate in favor of that result.

First, and significantly, the holding of unconstitutionality will have no prospective effect, for the challenged statutory scheme had ceased to exist well before the district court even ruled. The decision itself breaks no new ground, as the district judge merely applied established constitutional principles which this Court has since reiterated. Congress did not intend to force this Court to devote its full attention to holdings with such minimal implications.

"Congress . . . identified a narrow group of cases that merit the immediate and mandatory attention of this Court," and passed 28 U.S.C. § 1252 to bring those cases directly here, *Heckler v. Edwards,* 104 S.Ct. 1532, 1537 (1984), but this case only technically meets the requirements of that section. It is not among "the category of important cases", *id.* at 1539, that Congress believed should be immediately reviewed by this Court. While the decision below, like any decision holding a federal statute unconstitutional, "implicates separation of powers", *id.* at 1539, it does not disrupt the "certainty and uniformity in the federal government" which § 1252 was intended to address. *Id.* at 1539. Furthermore, it will have no "ramifications beyond the interests of litigants in the particular case." *Id.* at 1539; see also *Walters v. National Association of Radiation Survivors,* 53 U.S.L.W. 4947, 4951 (June 25, 1985).

The Secretary herself admits that, but for the certification of a class, she probably would not have sought review when Congress had already addressed the problem. (Jur. Statement, at 11-12.) She strongly implies that it was not the class itself (i.e., its existence or the amount of benefits) which prompted her decision, but, rather, her preoccupation with the relationship between 42 U.S.C. § 405(g) and class certification. (See *id.* at 12.) The Secretary is in effect attempting to use the direct appeal mechanism to present her theories about § 405(g) to this Court. Her interest in the constitutional issue which implicates the jurisdiction of this Court is only as a hook to obtain review of other, nonconstitutional issues.

Furthermore, the number of people affected by this decision is relatively small. The Secretary originally estimated that, in a one-year period, only 118 people would have been adversely affected by the statutory scheme. More recently, she has suggested a class of about 1000 members. Jur.Statement, at 26. Whatever the correct figure, the class is clearly small. Indeed, even using the higher figure for the class, the Secretary has recently estimated that the total payment required as a result of this case will be only $5.6 million.[7] Since the Social Security Administration pays out approximately $175 *billion* a year in its Old Age, Survivors, and Disability Insurance program,[8] the amount at stake in this case is in-

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[7] Affidavit of Jack Gallagher, ¶12, filed in support of Secretary's opposition to plaintiffs' motion to compel compliance, June 17, 1985.

[8] 48 *Social Security Bulletin* 5, at Table M-1, p. 49 (May, 1985) (published by Social Security Administration).

significant. No future benefits will flow from this case, so that the only impact of the decision below will be the payment of retroactive benefits to the class members.

The only practical question posed by this case is whether a small class of people will be compensated for periods ranging from one month to five years.[9] If the Court notes probable jurisdiction of this case, it will be agreeing to review a statutory scheme which has not existed since 1983, using a standard of review which was carefully employed by the district court and which has been stated and restated by this Court, including as recently as last month. While 28 U.S.C. § 1252 requires that this appeal come directly to this Court, none of the policy considerations motivating that procedure are present in this case. It does not warrant plenary review, and the decision below should be summarily affirmed.

II. THE APPEAL OF CLASS CERTIFICATION SHOULD BE DISMISSED AND REFERRED TO THE COURT OF APPEALS

As an initial matter, plaintiffs note that the Secretary is inaccurate in depicting the district court's analysis of 42 U.S.C. § 405(g) as a departure from controlling law. This Court and numerous lower courts have held in a variety of situations that exhaustion of administrative rem-

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[9] Given the district court's definition of the class, it is unlikely that any class members will be eligible for the full five years. Most will probably receive benefits based on a considerably shorter period.

edies is not invariably required under § 405(g).[10] Similarly, this Court has held that the sixty-day provision in that section is a statute of limitations, not a jurisdictional requirement.[11] Accordingly, the lower courts have regularly concluded that § 405(g) does not require putative class members to satisfy the sixty-day rule as articulated by the Secretary.[12] Given this authority, summary affirmance on the class issue would be appropriate.

Plaintiffs have requested this Court to summarily affirm on the merits, however. If this Court employs that suggested disposition, dismissal of the Secretary's class

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[10] *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976); *Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975); *Johnson v. Heckler*, No. 85-1254 (7th Cir., July 30, 1985), slip op., at 9-10, aff'g 607 F.Supp. 875, 880 (N.D.Ill. 1984); *Klein v. Heckler*, 761 F.2d 1304, 1312 (9th Cir. 1985); *Boettcher v. Secretary of Health & Human Services*, 759 F.2d 719, 721-22 (9th Cir. 1985); *Reed v. Heckler*, 756 F.2d 779, 784-85 (10th Cir. 1985); *Polaski v. Heckler*, 751 F.2d 943, 952-53 (8th Cir. 1984); *City of New York v. Heckler*, 742 F.2d 729, 736-37 (2d Cir. 1984), pet. for rehearing denied, 755 F.2d 31 (2d Cir. 1985); *Lopez v. Heckler*, 725 F.2d 1489, 1500-03 (9th Cir.), vac'd and rem'd on other grounds 105 S.Ct. 583 (1984); *Kuehner v. Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), vac'd and rem'd on other grounds 105 S.Ct. 376 (1984); *Liberty Alliance of the Blind v. Califano*, 568 F.2d 333, 345-46 (3d Cir. 1977); *Dixon v. Heckler*, 589 F.Supp. 1494, 1500-01 (S.D.N.Y. 1984); *Avery v. Heckler*, 584 F.Supp. 312, 319 (D.Mass. 1984), aff'd on other grounds, 762 F.2d 158 (1st Cir. 1985); *Holden v. Heckler*, 584 F.Supp. 463, 481-83 (N.D. Ohio 1984).

[11] *Eldridge*, 424 U.S., at 328 n.9; *Salfi*, 422 U.S., at 764.

[12] *Johnson v. Heckler*, *supra*, slip op., at 10-11, aff'g 607 F. Supp., at 878; *City of New York*, 742 F.2d, at 737-38; *Lopez*, 725 F.2d, at 1505-06; *Mental Health Association of Minnesota v. Heckler*, 720 F.2d 965, 973 n. 19 (8th Cir. 1983); *Holden*, 584 F.Supp., at 483; *Kennedy v. Harris*, 87 F.R.D. 372, 376-77 (S.D. Cal. 1980; see also *Lloyd Noland Hospital & Clinic v. Heckler*, 762 F.2d 1561, 1564-65 (11th Cir. 1985) (interpreting identical provision in Medicare statute and relying on *Salfi* and *Eldridge*).

appeal is called for. This Court has expressly stated that when the only matter on appeal is not constitutional, § 1252 should not be literally construed to require a direct appeal. Rather, the "sense of the thing" controls, and this Court's docket should not be burdened with issues which Congress did not intend to be subject to direct appeal. *Edwards*, 104 S.Ct., at 1538. A logical reading of § 1252, and of this Court's "commonsense view" of it, *id.* at 1538, suggests that, if the constitutional appeal is summarily affirmed, the Court should decline to review any nonconstitutional issues which were also appealed.

There is no practical difference between the situation existent after the merits are summarily resolved, and that which obtained in *Edwards*, where only a nonconstitutional issue was appealed. In both situations, only the scope of relief was at issue on appeal. The only distinction, that an appeal on the merits was actually taken to this Court in this instance, is irrelevant; the conclusion in *Edwards* that Congress did not intend § 1252 to require this Court to crowd its docket with direct appeals of nonconstitutional questions is equally applicable here.[13] However important the Secretary may view the issues raised by its class action appeal, this Court has made it clear that the impact or importance of an issue is not the determining factor for the exercise of this Court's jurisdiction un-

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[13] Similarly, in *Montana Contractors' Association v. Kreps*, 442 U.S. 935 (1979), the Court dismissed a cross-appeal "for want of jurisdiction" after the government decided not to perfect its appeal on the constitutional issue. The only difference from this case is that here the appeal was perfected. In both instances, however, termination of the appeal on the merits should divest this Court of jurisdiction over the nonconstitutional issue.

der § 1252. *Edwards*, 104 S.Ct. at 1540. As this Court recently summarized:

> "[T]he decisions Congress targeted for appeal under § 1252 were those which involved the exercise of judicial power to impair the enforcement of an Act of Congress on constitutional grounds, and . . . it was the constitutional question that Congress wished this Court to decide."

Walters v. National Association of Radiation Survivors, *supra*, 53 U.S.L.W., at 4951.

In this case, the Court would properly implement the Congressional goal of limiting plenary review to appeals involving constitutional issues by dismissing the Secretary's appeal on the class question. Moreover, the Court will accomplish other goals important to docket control. In the usual case, issues percolate through the appellate courts, where they are distilled and refined. In this case, however, if the Court accords plenary review, it will be required to analyze the district court's discussion of exhaustion and the sixty-day rule without benefit of the views of three appellate judges. If the issues raised by the Secretary's class appeal are as important as the Secretary contends, then they deserve considerably more analysis at the lower court level before this Court is required to devote its full attention to these matters. The Court would still have the opportunity to review these issues after the Court of Appeals has added its insight to the analysis.

If this Court believes that those issues do warrant immediate review, dismissal of the Secretary's class appeal in this case will not preclude it from considering them.

They have been raised in a number of other cases,[14] and the Secretary has already requested review in two of those.[15] No purpose is served by using the instant case, which has been reviewed by only one judge, as the vehicle to test the validity of the Secretary's arguments regarding § 405(g).

The reasons outlined by this Court for declining to assert jurisdiction under § 1252 when the constitutional issue is not appealed are fully applicable to the situation where the constitutional issue is appealed but is summarily affirmed. Neither the intent of Congress nor this Court's need for docket control favors retention of a non-constitutional appeal in that situation. As in *Edwards*, "the formal prerequisites to direct appeal under § 1252 were met in the present case," 104 S.Ct., at 1541, but, also as in *Edwards*, no purpose would be served by slavishly following the literal terms of that provision to require this Court to maintain its appellate jurisdiction. Accordingly, if the Court summarily affirms on the merits, it should remand the Secretary's appeal on the class issue.

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[14] See cases cited *supra*, at 23 nn. 10, 12.

[15] *Heckler* v. *Polaski*, No. 85-55 (pet. for cert. filed, July 11, 1985) (exhaustion); *Heckler* v. *City of New York*, No. 84-1923 (pet. for cert. filed, June 10, 1985) (60-day rule and exhaustion).

CONCLUSION

On Question 1, the Court should summarily affirm. On Question 2, the Court should dismiss the appeal from its docket and remand it to the Court of Appeals.

Respectfully submitted,

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No. 84-1905

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

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REPLY BRIEF FOR THE APPELLANT

Appellees urge this Court summarily to affirm the decision of the district court on the merits, which held unconstitutional the provisions of the Social Security Act in effect between 1979 and 1983 that granted benefits to widowed spouses, but not to surviving divorced spouses, who remarried after age 60. Appellees also urge the Court to dismiss the Secretary's appeal and "remand" it to the court of appeals insofar as the Secretary seeks review of the district court's award of relief to a nationwide class of persons who did not satisfy the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g). Each of appellees' arguments is without merit.

1. a. Throughout the history of the Social Security Act, Congress has distinguished in a number of respects between spouses who were divorced and spouses who remained married. In *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976), the Court observed that "[d]ivorce by its nature

works a drastic change in the economic and personal relationship between a husband and wife," and the Court accordingly held that Congress could rationally assume that "divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." Similarly, in *Califano* v. *Jobst,* 434 U.S. 47 (1977), the Court sustained as "unquestionably valid" the general rule under the Social Security Act that eligibility for secondary benefits terminates upon marriage. The Court explained that "[b]oth tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status" (*id.* at 53). In the face of *DeCastro* and *Jobst,* appellees expressly concede that Congress was not required to provide Social Security benefits to surviving divorced spouses, and they likewise do not challenge the validity of the general marriage rule under the Social Security Act. See Mot. to Dis. or Aff. 15, 17.

Appellees argue, however, that because Congress elected, beginning in 1979, to permit *widowed* spouses to receive survivors benefits based on their former spouses' accounts even if they remarried after age 60, Congress also was required to provide such benefits to surviving *divorced* spouses who remarried after age 60. The premise of appellees' argument is that because Congress chose to permit certain divorced spouses to receive the same survivors benefits that widowed spouses receive upon the death of the primary wage earner, Congress must have determined that the two categories are identically situated upon the death of the primary wage earner; having so determined, the argument proceeds, Congress could not rationally determine that there are *any* differences between these two categories of survivors upon remarriage. See Mot. to Dis. or Aff. 15-16, 17-18. This argument is seriously flawed.

The mere fact that Congress chose to make surviving divorced spouses eligible for survivors benefits in certain circumstances does not mean that Congress found that surviving divorced spouses and widowed spouses are identically situated even upon the death of the primary wage earner. To the contrary, this Court held in *De Castro*—which was decided in 1976, well after Congress first had made some surviving divorced wives eligible for survivors benefits in 1965 (Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376; see J.S. 3)—that it was rational for Congress to assume that divorced husbands and wives generally depend less on each other for financial and other support than do couples who stay married.

There is no reason to believe that Congress was of a different view regarding the relative dependency of married and divorced spouses in 1977, when it retained the eligibility of certain divorced spouses for survivors benefits upon the death of the primary wage earner but enacted the distinction (challenged by ~~cross-appellants~~ appellees) with regard to eligibility for such benefits after remarriage. Rather, Congress presumably concluded in 1977 only that divorced spouses were likely to have been dependent upon the deceased wage earner to a sufficient extent (even if not with the *same* degree of likelihood and to the *same* extent as spouses who had remained married to the primary wage earner until his death) to warrant treating them similarly to widows or widowers upon the death of the primary wage earner. It is fully consistent with this conclusion for Congress at the same time to have believed that significant differences nevertheless remained between widowed spouses and surviving divorced spouses. Accordingly, there was nothing irrational about Congress's continuing to give effect to those differences in the 1977 amendments by treating widowed spouses who remarry after age 60 more favorably than surviving divorced spouses who remarry.

The rationality of this differing treatment is further supported by the fact that benefits paid to a surviving divorced spouse are not subject to or counted against the ceiling that is placed on the total amount of benefits that may be paid on a single wage earner's account at any one time. See 42 U.S.C. 403(a)(3)(C). Thus, for example, if the primary wage earner had remarried after the divorce, both the widowed spouse and the surviving divorced spouse could be eligible for the full amount of survivors benefits when the primary wage earner died, without regard to the statutory ceiling. It was reasonable for Congress to terminate that multiple eligibility upon the remarriage of the surviving divorced spouse, even if it occurred after age 60. Congress rationally could determine that, at that point, the surviving divorced spouse should look to his new spouse, not to the Social Security account of the former spouse, for any necessary support.

Moreover, the purpose of secondary benefits under the Social Security Act is to afford adequate protection to the wage earner's family as a unit. *Jobst,* 434 U.S. at 52; *Califano* v. *Goldfarb,* 430 U.S. 199, 208-209 (1977) (opinion of Brennan, J.). In the case of a surviving divorced spouse, the family ties were broken prior to the primary wage earner's death, whereas in the case of a widowed spouse, the family ties were never actually broken at all. It therefore was reasonable for Congress to conclude that a widowed spouse has a stronger equitable claim upon remarriage to retain his entitlement to survivors benefits derived from the prior family arrangement than does the surviving divorced spouse.

b. The only decision of this Court upon which appellees rely in arguing that the statutory distinction at issue here is unconstitutional is *Hooper* v. *Bernalillo County Assessor,* No. 84-231 (June 24, 1985). See Mot. to Dis. or Aff. 18-20. That decision, however, has no bearing on this case. There,

the Court held that a New Mexico statute that granted a tax credit to Vietnam era veterans only if they resided in the State before May 8, 1976, violated the Equal Protection Clause because a state may not legitimately favor long-time residents over more recent arrivals in distributing benefits. Slip op. 9-11. In this case, by contrast, there is nothing inherently illegitimate about a distinction between widowed spouses and divorced spouses.

2. a. Appellees make essentially no effort to rebut our submission (J.S 18-26) that the district court's judgment is inconsistent with the text of 42 U.S.C. 405(g), implementing regulations, and the decisions of this Court insofar as it grants relief to a class of persons who had not exhausted their administrative remedies or obtained judicial review within 60 days of the Secretary's final decision on their claims for benefits. Perhaps recognizing the weakness of their position, appellees instead attempt to persuade this Court not to review the district court's jurisdictional rulings. They argue (Mot. to Dis. or Aff. 23-26) that, if the Court summarily affirms the district court's ruling on the constitutional issue, it should dismiss the Secretary's appeal on the jurisdictional issues under 42 U.S.C. 405(g) and "remand" that portion of the appeal to the court of appeals.

Even if the Court were to affirm on the constitutional issue, there would be no support for appellees' novel suggestion that the Court should dismiss the Secretary's appeal from the district court's award of relief to class members over whom it plainly had no jurisdiction. To the contrary, this suggestion flies in the face of this Court's repeated recognition that once the Court has assumed jurisdiction under 28 U.S.C. 1252 over an appeal raising a constitutional issue, the "whole case" is to come before the Court. See, *e.g.*, *National Railroad Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, No. 83-1492 (Mar. 18, 1985), slip op. 13 n. 21; *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip

op. 8, 9 & n.12, 14. Under this principle, if the Court were to affirm the district court's ruling on the merits, it still would be necessary for the Court to review the scope of the district court's judgment in order to determine the proper application of its holding that an Act of Congress is unconstitutional.

Nor is there any authority for appellees' equally novel suggestion that the Court may "remand" a portion of the Secretary's appeal to the court of appeals, even though the appeal had not previously been in that court.* It is significant in this regard that Congress, in 28 U.S.C. 1631, provided for the transfer of appeals from one court to another only in certain limited circumstances. Under Section 1631, if an appeal is taken to a court that does not have jurisdiction, that court may transfer the case to another court in which the appeal could have been brought at the time the original appeal was taken. Section 1631 plainly has no application here. This Court *does* have jurisdiction over the "whole case"—including the jurisdictional issues under 42 U.S.C. 405(g)—by virtue of the Secretary's direct appeal under 28 U.S.C. 1252 raising the constitutional issue, and

---

*Compare *Minnesota Public Interest Research Group* v. *Selective Service System*, No. 83-637 (July 5, 1984). There the appeal in question had originally been taken to the court of appeals under 28 U.S.C. 1291, and it subsequently was transferred to this Court pursuant to the second paragraph of 28 U.S.C. 1252 after a direct appeal on the constitutional issue was taken to this Court pursuant to the first paragraph of 28 U.S.C. 1252. After this Court disposed of the government's direct appeal under the first paragraph of Section 1252 (see *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276 (July 5, 1984)), the Court vacated the court of appeals' order transferring the related appeal to this Court under the second paragraph of Section 1252 and transferred that appeal back to the court of appeals. In the instant case, by contrast, the Secretary did not take a separate appeal to the court of appeals on the issues arising under 42 U.S.C. 405(g); those issues are presented as part of a single appeal from the district court's judgment.

an appeal raising the jurisdictional issues could *not* have been taken to the court of appeals under 28 U.S.C. 1291 at the time the Secretary took a direct appeal to this Court under the first paragraph of 28 U.S.C. 1252, because 28 U.S.C. 1291 expressly excludes from the jurisdiction of the courts of appeals any case "where a direct review may be had in the Supreme Court."

b. As we have explained (J.S. 25-26), the rulings by the district court on the exhaustion and 60-day filing requirements under 42 U.S.C. 405(g) independently warrant review by this Court. We also have asked the Court to grant review on questions of jurisdiction under 42 U.S.C. 405(g) in *City of New York* v. *Heckler*, petition for cert. pending, No. 84-1920. There are, however, differences between the two cases that warrant the Court's granting of plenary review in both.

In this case, the named appellees invoked the special mechanism the Secretary has established by regulation for dispensing with the exhaustion requirement where the only issue involved is the constitutionality of a provision of the Social Security Act and where the Secretary and the claimant have stipulated that all other factual and legal issues bearing on that individual's particular claim for benefits have been resolved at the preliminary stages of administrative review. The availability of an expedited exhaustion procedure in this limited category of cases (compare *Weinberger* v. *Salfi*, 422 U.S.C. 749, 766-767 (1975)) demonstrates that the Secretary has not determined that exhaustion would be futile or should be dispensed with for other claimants with whom she has not entered into a comparable stipulation—including the unnamed class members in the instant case and the class members in *City of New York*. See J.S. 6-8, 19-21. Similarly, the district court's rationale for dispensing with the 60-day filing requirement in this case—that the running of the 60-day period was tolled on a

nationwide basis for all class members from the date on which appellee Buenta Owens filed her request for administrative reconsideration of the initial denial of her claim for benefits (see J.S. 10, 21-25; J.S. App. 21a-22a)—differs from the rationale for dispensing with the 60-day filing requirement on a class-wide basis adopted by the Second Circuit in *City of New York*.

Thus, in order for the Court to address the jurisdictional issues under 42 U.S.C. 405(g) in a definitive fashion and to resolve the uncertainty and widespread disruption of the Social Security program that have been occasioned by the divergent rulings of numerous lower courts on these questions, we believe that it would be beneficial for the Court to consider this case together with *City of New York*.

For the foregoing reasons and the additional reasons stated in the Jurisdictional Statement, it is respectfully submitted that probable jurisdiction should be noted.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

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CLERK

No. 84-1905

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. Whether provisions of the Social Security Act in effect between 1979 and 1983 that authorized payment of benefits to surviving widowed spouses, but not surviving divorced spouses, who remarried after age 60 violate the equal protection component of the Due Process Clause of the Fifth Amendment.

2. Whether, in this action for judicial review pursuant to 42 U.S.C. 405(g), the district court properly certified a nationwide class that includes persons who did not exhaust their administrative remedies and obtain a "final decision" of the Secretary on their claims for benefits or who received the final decision of the Secretary more than 60 days prior to the filing of this action.

PARTIES TO THE PROCEEDINGS

The appellant is Margaret M. Heckler, Secretary of Health and Human Services.

The named appellees are Buenta M. Owens and Kenneth R. Owens. The district court certified a class, represented by those named appellees, consisting of (J.S. App. 31a):

> [A]ll persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivor's benefits, as surviving divorced spouses, for any month after December, 1978, *provided* that such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1905

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The December 23, 1983 order of the district court granting the Secretary's motion for summary judgment (J.S. App. 1a-12a) and the August 28, 1984 order of the district court certifying the class (J.S. App. 13a-28a) are unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (J.S. App. 30a-43a) also is unreported.

JURISDICTION

The judgment of the district court (J.S. App. 44a-46a) was entered on December 20, 1984, and the order of the

district court denying the Secretary's motion to alter or amend the judgment was entered on February 6, 1984 (J.S. App. 47a). A notice of direct appeal to this Court was filed on March 7, 1985 (J.S. App. 48a), and an amended notice of appeal was filed on March 8, 1985 (J.S. App. 49a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the appeal to and including June 5, 1985. The appeal was docketed on that date, and probable jurisdiction was noted on October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment; Section 202(e)(1), (4), (f)(1) and (5) of the Social Security Act, 42 U.S.C. 402(e)(1), (4), (f)(1) and (5), as in effect between 1979 and 1983; and Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), are reproduced at App., *infra*, 1a-5a.

STATEMENT

The Social Security Act was amended, effective January 1979, to permit a surviving *widowed* spouse who remarried after age 60 to receive monthly survivor's benefits based on the deceased spouse's earnings account. However, until January 1984, a surviving *divorced* spouse who remarried was not entitled to receive survivor's benefits based on the deceased former spouse's account. The district court held that this distinction in effect from 1979 through 1983 was irrational and therefore violated the Due Process Clause of the Fifth Amendment. The district court also ordered relief in this action under 42 U.S.C. 405(g) to a nationwide class that includes individuals who did not exhaust their administrative remedies or seek judicial review within 60 days of receiving the final decision of the Secretary. In this appeal, we challenge both aspects of the district court's judgment.

A. THE STATUTORY AND REGULATORY FRAMEWORK

1. *Substantive Provisions*

The statutory provisions at issue in this case were in effect during one stage in the gradual evolution and expansion of the provisions of the Social Security Act that authorize the payment of survivor's and other benefits to spouses and former spouses of insured wage earners.

a. The Social Security Act, as enacted in 1935, provided only primary benefits for qualified wage earners. Ch. 531, §§ 201 *et seq.*, 49 Stat. 622 *et seq.* In 1939, Section 202 of the Act (49 Stat. 623) was amended to provide secondary benefits for wives, dependent children, widows and surviving dependent parents. Ch. 666, § 201, 53 Stat. 1363. The Act as so amended provided that widows and other secondary beneficiaries would lose their entitlement to monthly benefits if they married. § 202(e)(1)(A) of the Act (§ 201, 53 Stat. 1365); see also § 202(c)(1) and (f)(1) of the Act (§ 201, 53 Stat. 1364 and 1366). In 1950, Congress added Section 202(c) and (f) to the Act to provide secondary benefits for husbands and widowers. Ch. 809, § 101(a), 64 Stat. 483, 485.[1] As in the case of widows, widowers lost their entitlement to benefits upon remarriage. § 202(f)(1)(A) of the Act (§ 101(a), 64 Stat. 485). In 1958, however, Congress enacted an exception to this remarriage rule, providing that if a widow or widower married an individual who also was entitled to receive certain secondary benefits under the Act, he or she would not lose the entitlement to survivor's benefits. § 202(e)(4)(A) and (f)(4) of the

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[1] A husband or widower was entitled to receive benefits only if he previously had received one-half of his support from his wife. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), this Court held that the requirement that widowers, but not widows, show such support unconstitutionally discriminated on the basis of sex. Congress thereafter repealed the dependency requirement for widowers. Pub. L. No. 95-216, § 334(d)(1), 91 Stat. 1545; 42 U.S.C. 402(f)(1). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 2.

Act, as added by Pub. L. No. 85-840, § 307(b) and (c), 72 Stat. 1031. See *Califano* v. *Jobst*, 434 U.S. 47, 51 (1977).

b. In 1965, Congress amended Section 202(b) of the Act to make a divorced wife eligible for wife's benefits if: (i) she had been married to her former husband for at least 20 years, and (ii) either she received more than one-half of her support from her former husband or there was an agreement or court order in effect that required him to make substantial contributions to her support. Pub. L. No. 89-97, § 308(a), 79 Stat. 375-376. See also § 216(d)(1) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377. Congress likewise amended Section 202(e) of the Act to permit a divorced wife over age 60 whose former husband had died to receive widow's benefits, but only if she satisfied the same duration-of-relationship and support requirements that a divorced wife had to meet in order to receive wife's benefits while her former husband was still alive. Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376-377. See also § 216(d)(2) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377.

Although Congress imposed eligibility restrictions on divorced wives and surviving divorced wives that did not apply to wives and widows, in another respect Congress was especially generous in extending this new coverage to them. In order to prevent any unfairness that might have resulted from the fact that the wage earner's divorced wife and his new wife both might be eligible for wife's or widow's benefits, Congress provided that benefits paid to a divorced wife or surviving divorced wife would not be subject to or counted against the ceiling that otherwise applied to the amount of benefits that could be paid on a single wage earner's account at any one time. See § 203(a)(3) of the Act, as added by Pub. L. No. 89-97, § 308(d)(6), 79 Stat. 378-379.

Finally, as under the preexisting rule affecting widows, Congress provided that a divorced wife or surviving divorced wife could not receive wife's or widow's benefits if she remarried, unless she married a man receiving secondary benefits as a dependent widower, dependent parent, or disabled child aged 18 or over. See § 202(b)(1)(C), (3), (e)(1)(A) and (3) of the Act, as amended and renumbered by Pub. L. No. 89-97, § 308(a), (b)(1) and (b)(3), 79 Stat. 375, 376, 377.[2] But at the same time, Congress relaxed the remarriage rule as it applied to widows and widowers. Specifically, Congress provided that if a widow or widower, after reaching age 60, married an individual who was not entitled to receive certain benefits under the Act, he or she would not forfeit survivor's benefits; instead, the benefits were reduced to 50% of the primary wage earner's benefit. See § 202(e)(4) and (f)(5) of the Act, as added by Pub. L. No. 89-97, § 333(a)(1) and (b)(1), 79 Stat. 403 and 404.[3]

c. In 1972, Congress eliminated the requirement that a divorced wife or surviving divorced wife establish either that she received more than one-half of her support from her former husband or that she was the beneficiary of an agreement or court order providing for substantial support. Pub. L. No. 92-603, § 114(a) and (b), 86 Stat. 1348.

d. In 1977, Congress again amended the relevant provisions of the Social Security Act. In that year, it revised Section 202(e)(4) and (f)(5) of the Act to pro-

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[2] Under these provisions, the survivor's benefits of a divorced wife or surviving divorced wife terminated if she married a person receiving old-age benefits. However, this impact was offset by the fact that, upon remarriage, she became eligible for wife's benefits on her new husband's account. See *Califano* v. *Jobst*, 434 U.S. at 51 n.6, quoting H.R. Rep. 2288, 85th Cong., 2d Sess. 18 (1958).

[3] As originally enacted, the relevant age for widowers was 62. That age was reduced to 60 in 1972. Pub. L. No. 92-603, § 107(a)(3), 86 Stat. 1343.

vide that if a widow or widower remarried after reaching age 60, the marriage would be "deemed not to have occurred" for purposes of entitlement to survivor's benefits. Pub. L. No. 95-216, § 336(a)(3) and (b)(3), 91 Stat. 1547. This amendment was effective for monthly benefits payable beginning in January 1979. *Id.* § 336(c)(1), 91 Stat. 1547. As a result, since 1979, widows and widowers have been entitled to unreduced survivor's benefits if they remarried after age 60. Congress also amended Section 216(d)(1) and (2) of the Act, effective January 1979, to reduce from 20 to 10 years the period during which a divorced wife or surviving divorced wife is required to have been married to the wage earner in order to be eligible for wife's or widow's benefits. Pub. L. No. 95-216, § 337, 91 Stat. 1548. But Congress retained the provisions that generally barred a divorced wife or surviving divorced wife from receiving benefits upon remarriage, even after reaching age 60. See § 202(b)(1)(C), (3), (e)(1)(A) and (F) of the Act.

e. Although by this time Congress had permitted divorced wives and surviving divorced wives to receive wife's and widow's benefits in certain circumstances, it had not expressly provided for divorced husbands and surviving divorced husbands to receive husband's and widower's benefits. In 1977, the statutory ineligibility of divorced husbands to receive husband's benefits was held unconstitutional under this Court's decisions concerning discrimination on the basis of sex. *Oliver* v. *Califano*, [Jan. 1977-Jan. 1978 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,244 (N.D. Cal. June 24, 1977). Thereafter, the Secretary promulgated regulations providing that divorced husbands would be eligible to receive husband's benefits to the same extent as divorced wives were eligible by statute to receive wife's benefits. 44 Fed. Reg. 34480, 34483-34484 (1979); see 20 C.F.R. 404.331. Similarly, in 1980, the ineligibility of surviving divorced husbands to receive widower's benefits was held unconstitu-

tional (*Ambrose* v. *Califano*, [Aug. 1981-Mar. 1982 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 17,702 (D. Ore. July 16, 1980)), and the Secretary thereafter promulgated regulations extending benefits to surviving divorced husbands on the same basis that they were provided by statute to surviving divorced wives. See *ibid.*; 20 C.F.R. 404.336. In 1983, as part of a general elimination of gender-based distinctions, Congress amended Section 202(c)(1) and (f)(1) of the Act expressly to make divorced husbands and surviving divorced husbands eligible for husband's and widower's benefits, respectively. Pub. L. No. 98-21, § 301, 97 Stat. 109-112.

f. Finally, also in 1983, Congress amended the Act to provide that surviving divorced wives and husbands who remarry after age 60 may receive widow's or widower's benefits in the same manner as widows and widowers. See § 202(e)(3) and (f)(4) of the Act, as amended and redesignated by Pub. L. No. 98-21, §§ 131(a)(2), (3)(A), (b)(2), (3)(A) and (d)(1), 301(b)(4), 97 Stat. 92, 93 and 111.[4] As a result, otherwise eligible members of the appellee class have been entitled to receive monthly widow's or widower's benefits since January 1984.

2. *Procedural Provisions*

Claims for survivor's and other benefits under Title II of the Social Security Act are considered by the Secretary pursuant to special procedures prescribed by Congress and the Secretary. The principal statutory provision pertaining to administrative review is Section 205(b) of the Act, 42 U.S.C. 405(b). That Section directs the Secretary "to make findings of fact, and decisions as to the rights of any individual applying for a

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[4] Congress did not, however, amend the Act to make divorced wives and divorced husbands eligible for wife's or husband's benefits if they remarry after reaching age 60. See § 202(b)(1)(C) and (H) of the Act, and § 202(c)(1)(C) and (H) of the Act, as amended by Pub. L. No. 98-21, § 301(a)(2), 97 Stat. 109-110.

payment" under Title II (42 U.S.C. 405(b)(1)). Section 205(b) further provides that if the individual is dissatisfied with the Secretary's preliminary "decision," the Secretary shall afford him a right to a hearing.

Pursuant to her authority under Section 205(a) of the Act "to make rules and regulations and to establish procedures" (42 U.S.C. 405(a); see also 42 U.S.C. 1302)), the Secretary has fleshed out these general statutory directives by establishing a four-step administrative procedure for review by the Social Security Administration (SSA) of claims for benefits. The four steps are: the initial determination (20 C.F.R. 404.902-404.904); a de novo reconsideration (20 C.F.R. 404.907-404.921); an evidentiary hearing before an administrative law judge (ALJ) (20 C.F.R. 404.944-404.965); and discretionary review by the Appeals Council (20 C.F.R. 404.976-404.983). The Secretary's decision rendered at the initial determination, reconsideration, or ALJ hearing stage is expressly made "binding" on the claimant unless he seeks further administrative review within 60 days (20 C.F.R. 404.905, 404.909(a)(1), 404.920, 404.933(b)(1), 404.955(a), 404.968(a)(1)), and an individual is personally notified that he must seek further administrative review within 60 days if he wishes to challenge that decision. See generally Pet. Br. at 3-6, *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985).

The four steps culminating in the Appeals Council's disposition "exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 3. Under Section 205(g) of the Act, 42 U.S.C. 405(g), the claimant may obtain judicial review of the Secretary's final decision "by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." If the claimant does not seek judicial review within 60 days of the Appeals Council's decision, that decision (or the ALJ's decision if the Ap-

peals Council denied review) is expressly made "binding" on the claimant. 20 C.F.R. 404.955(b), 404.981.

The Secretary has carved out only one exception to the requirement that a claimant fully exhaust his administrative remedies through the Appeals Council stage before seeking judicial review. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2 & n.2. This exception applies if the individual's claim for benefits has been denied at the reconsideration level, if he does not dispute the Secretary's findings of fact or interpretation or application of controlling law, and if the claimant alleges (and the Secretary agrees) that the only factor precluding an allowance of the claim is a statutory provision that the claimant contends is unconstitutional. In such a situation, a representative of the Secretary may enter into a formal agreement with the claimant deeming the reconsideration decision to be the Secretary's "final decision" for purposes of seeking judicial review pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.923-404.926. The claimant then has 60 days within which to seek judicial review. 20 C.F.R. 404.927. This special procedure was intended to implement the holding in *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975), that the Secretary may waive the requirement of full exhaustion in such circumstances. See 40 Fed. Reg. 53385 (1975).

B. THE PROCEEDINGS IN THIS CASE

1. a. Appellee Buenta Owens was married to Russell Judd in 1937 and divorced from him in 1968. In 1978, at the age of 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Buenta Owens applied for widow's benefits on Judd's earnings account as a surviving divorced wife. Her claim was denied. On October 19, 1982, Buenta Owens sought administrative reconsideration of that denial, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again

was denied in a reconsideration determination dated December 7, 1982. J.S. App. 1a, 13a-14a, 31a-32a; B.R. 2, 6-7, 9-10.[5]

Buenta Owens requested that her claim be considered under the expedited administrative appeals procedure provided by the Secretary's regulations, discussed above (see page 9, *supra*). B.R. 9. The designated representative of the Secretary determined that it would be appropriate to use this procedure, and he entered into an agreement with her to that effect on March 3, 1983 (J.S. App. 50a-51a). The agreement stated that Buenta Owens "accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd"; that she also "accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination"; and that except for the statutory provisions whose constitutionality she challenges, "the right of the claimant to benefits has been established by the claimant" (*id.* at 50a). On this basis, the agreement provided that "[t]he above-referenced reconsideration determination represents the final decision of the Secretary"; that the agreement "constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeal process"; and that she had 60 days within which to file a civil action to raise the constitutional issue (*id.* at 50a-51a). Buenta Owens then filed the contemplated civil action in the United States District Court for the Central District of California on April 19, 1983, within 60 days of the date of the agreement. She sought to represent a nationwide class of surviving divorced spouses. Complaint ¶ 6.

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[5] "B.R." refers to the transcript of the administrative record on the claim of appellee Buenta Owens that was filed in district court pursuant to 42 U.S.C. 405(g). "K.R." refers to the transcript of the administrative record on the claim of appellee Kenneth Owens.

b. Appellee Kenneth Owens was married to Dorothy L. Owens in 1934 and was divorced from her in 1978. He then married appellee Buenta Owens in 1978, when he was 60 years old. On July 15, 1982, Kenneth Owens applied for survivor's benefits based on the earnings account of his former wife, who had died. His claim was denied at the initial determination stage and in a reconsideration decision dated May 12, 1983. He likewise requested to use the expedited administrative appeals procedure, and on November 23, 1983, a representative of the Secretary entered into an agreement with him under that procedure. J.S. App. 14a, 32a, 52a-53a; K.R. 1-2, 14-18, 31, 34. On January 6, 1984, within 60 days of the date of the agreement, Kenneth Owens filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions. His class action subsequently was consolidated with that filed by his wife (J.S. App. 13a-15a).

2. a. In an opinion dated December 23, 1983—before Kenneth Owens filed suit—the district court at first rejected Buenta Owens' constitutional challenge to the statutory provisions (J.S. App. 1a-12a). The court declined to engage in strict scrutiny of the challenged provisions, even though they might create a "disincentive" to marry (*id.* at 5a-7a). The court explained that this Court has applied strict scrutiny only when the government "created substantial legal obstacles to entry into or exit from the marital state" (*id.* at 6a, citing *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). By contrast, the district court observed, the Court has applied the rational basis standard in reviewing provisions of the Social Security Act that deny benefits to some persons, but not others, based upon their marital status (J.S. App. 6a, citing *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977)). Applying the rational basis test, the court sustained the statutory distinction (J.S. App. 7a-12a).

It reasoned that, as in *Califano* v. *Jobst*, 434 U.S. at 57-58, Congress reasonably could decide to take one step at a time in removing the perceived hardship of the remarriage rule—lifting it as to widowed spouses effective January 1979 and as to surviving divorced spouses effective January 1984 (J.S. App. 10a-11a).

b. Buenta Owens then filed a motion to alter or amend the judgment. While that motion was pending, the court, by order dated August 28, 1984, certified a nationwide plaintiffs' class. That class consists of all surviving divorced spouses who remarried after age 60 and who were denied monthly benefits for any month after December 1978, provided that the claimant's application was filed on or after August 20, 1982 or that the time within which to seek review of a decision denying an application filed prior to that time had not expired as of August 20, 1982 (J.S. App. 13a-28a; see *id.* at 28a, 44a). The district court acknowledged that 42 U.S.C. 405(g) was the exclusive source of jurisdiction over this suit and that, under *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), a class may be certified only if each of its members satisfies all of the requirements for judicial review set out in Section 405(g) (J.S. App. 15a-16a). Nevertheless, the court defined the class to include many individuals who had not exhausted their administrative remedies or who had received the Secretary's final decision denying their claims for benefits more than 60 days before this suit was filed.

Citing the regulations pursuant to which the Secretary and appellees Buenta and Kenneth Owens had entered into agreements stipulating that exhaustion would not be required with regard to their own individual claims for benefits, the district court held that the Secretary had thereby waived exhaustion for *all* class members, without regard to whether the Secretary had entered into a similar agreement with each of them (J.S. App. 17a-18a). The court further held that it could in any event excuse a failure to comply with the exhaustion requirement on

a class-wide basis where the constitutionality of a statutory provision was at issue (*id.* at 18a-19a).

The district court treated the statutory requirement that judicial review be sought within 60 days as an ordinary statute of limitations. It then held that the running of the 60-day period should be tolled retroactively for all class members on a nationwide basis as of October 19, 1982, the date on which appellee Buenta Owens sought administrative reconsideration of the initial determination denying her claim for benefits (J.S. App. 20a-21a). In the court's view, the filing of this "single administrative complaint" by Buenta Owens gave the Secretary adequate notice of the constitutional contention and an opportunity to evaluate its effects on similarly situated persons (*id.* at 21a). Accordingly, the court included in the class any individual who had a live claim for benefits pending administratively on or after August 20, 1982, which was 60 days before Buenta Owens requested reconsideration (*id.* at 22a) but more than eight months before she filed the instant action for judicial review pursuant to 42 U.S.C. 405(g).

c. After it certified a nationwide class, the district court, by opinion and order dated October 5, 1984, reversed its prior ruling on the merits and held unconstitutional the challenged distinction between the eligibility of surviving widowed spouses and surviving divorced spouses upon remarriage (J.S. App. 29a, 30a-43a). The court again acknowledged that "[t]he one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here" (*id.* at 39a). But this time the court found that justification insufficient. The court explained that "Congress must have a rational basis for each step it takes," and that the statutory distinction "must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses" (*id.* at 40a). The court expressly agreed with

the Secretary that Congress rationally *could* so assume (*id.* at 42a), but it nevertheless held that the challenged distinction was irrational. The court relied on its belief that Congress in 1977 had chosen to treat surviving widowed spouses and surviving divorced spouses in the same manner upon the death of the primary wage earner. In light of that action by Congress, the court found no "logical basis" to distinguish between those two classes of individuals upon their subsequent remarriage (*ibid.*).

As relief, the district court enjoined the Secretary from applying the challenged provisions to appellees Buenta and Kenneth Owens and other eligible class members, ordered her to pay retroactive benefits to the named appellees, and directed her to determine and assure payment of survivor's benefits to other class members within 120 days (J.S. App. 44a-46a).[6]

SUMMARY OF ARGUMENT

I. Throughout the history of the Social Security program, Congress has distinguished between spouses who have remained married and those who have divorced. It was not unconstitutional for Congress to draw on that established distinction by providing, between 1979 and 1983, that widowed spouses, but not surviving divorced

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[6] By order entered July 11, 1985, the district court granted a stay pending appeal of those portions of its judgment that required the Secretary to pay benefits to the unnamed class members, but the court ordered the Secretary to identify all class members and to adjudicate their claims pending appeal. We have been informed by HHS that in order to identify the claimants who are members of the class, HHS first used computer coding to identify a total of 13,641 potential class members. The claims file of each of these individuals then had to be manually reviewed to determine whether the claimant was a surviving divorced spouse who remarried after reaching age 60 and who otherwise fell within the class definition. In a status report filed on December 2, 1985, the Secretary informed the district court that 13,048 of these individual claims files had been reviewed and that 533 eligible class members had been identified in that process.

spouses, who remarry after reaching age 60 may retain their eligibility for survivor's benefits.

A. Statutory classifications that base eligibility for secondary benefits under the Social Security Act on marital status are not inherently invidious and do not impinge on fundamental rights. Accordingly, the statutory provisions at issue here must be sustained because they do not "manifest[] a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

B. Appellees were denied survivor's benefits because of the combined presence of two factors: their divorce from the primary wage earner, and their subsequent marriage to another spouse. Each of these factors has been sustained by this Court as a constitutionally permissible basis on which to distinguish between classes of potential secondary beneficiaries. In *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court held that the uniform rule in effect under the Social Security Act prior to 1958 that terminated all secondary benefits upon remarriage was "unquestionably valid" (434 U.S. at 54), because Congress rationally could determine that a married person is less likely to be dependent upon his prior family unit than is an unmarried person. *Id.* at 53. Similarly, in *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976), the Court held that Congress rationally could assume that "divorced husbands and wives depend less on each other than do couples who stay married." See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

C. The district court acknowledged that under *De Castro* and *Boles*, Congress rationally could conclude that surviving divorced spouses generally are less dependent upon the resources of their former spouses than are widows and widowers. But the court held that because Congress chose to treat widowed spouses and divorced spouses identically upon the death of the primary wage earner, it was irrational for Congress to distinguish be-

tween them upon remarriage. The court's reasoning was seriously flawed.

To begin with, Congress has never treated widowed spouses and divorced spouses identically with respect to their initial eligibility for survivor's benefits. Although widows need not establish that they received substantial support from their former husbands, and have been subject to only a minimal one-year duration-of-marriage requirement, divorced wives, from the outset of their eligibility in 1965, have been required to meet stringent duration-of-marriage and (until 1972) support criteria. Thus, the court's holding of unconstitutionality was based on a mistaken, albeit critical, premise. Moreover, the difference in treatment upon remarriage was not new in 1977, as the district court also seemed to believe, because Congress had relaxed the remarriage rule for widows and widowers in 1965.

In any event, the fact that Congress chose to make a limited category of divorced spouses eligible for survivor's benefits does not mean that Congress actually found them to be situated identically to widowed spouses. Congress presumably found only that their circumstances were sufficiently alike to justify similar treatment upon the death of the wage earner. It was not inconsistent with that legislative judgment for Congress also to believe that there were significant differences between the two categories and to give effect to those differences upon remarriage.

It often is necessary for Congress to proceed one step at a time in extending benefits to new categories of beneficiaries under the Social Security Act. Congress's decision to include widowed spouses, but not surviving divorced spouses, in the step it took in 1977 is supported by a number of relevant factors, in addition to the difference in their dependence upon the resources of the former spouse. First, a divorced spouse's ties to the wage earner's family unit were legally severed. Second, a di-

vorced spouse who remarries reasonably may be expected to look to his or her new spouse, not to the former spouse's Social Security account, for needed support, since alimony and support payments also commonly terminate upon remarriage; by contrast, a widowed spouse does not typically forfeit his or her interests deriving from the former marriage (*e.g.*, an interest in the deceased spouse's estate) upon remarriage. Third, remarriage is an appropriate occasion to terminate the potential for a substantial drain on the Trust Fund caused by the multiple eligibility of both the wage earner's divorced spouse and his or her new spouse.

II. The district court erred in granting relief to a nationwide class of claimants. The named appellees satisfied the jurisdictional prerequisites to suit under 42 U.S.C. 405(g), because the Secretary formally designated the denial of their claims at the reconsideration level as her "final decision" and they then sought judicial review within 60 days. But the district court disregarded this Court's holdings that each unnamed class member also must individually satisfy the final decision and 60-day filing requirements in 42 U.S.C. 405(g).

A. Because there is no allegation that each of the unnamed class members received a final decision from the Appeals Council, as required by governing regulations, the district court had no jurisdiction over their claims. The district court's conclusion that it was unnecessary for the class members to obtain a final decision because exhaustion would have been futile was directly contrary to this Court's holding in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), that a final decision is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed with merely by a judicial conclusion of futility" (*id.* at 766 (emphasis added)).

The Court held in *Salfi* that the *Secretary* could dispense with exhaustion in certain circumstances, and the Secretary thereafter established a procedure for doing so. Pursuant to that procedure, the Secretary entered into

agreements with the two named appellees, in which she stipulated that only the question of the constitutionality of the statutory provisions remained and that the denial of their claims at the reconsideration level was her "final decision." However, none of the unnamed class members invoked that procedure for obtaining judicial review without full exhaustion of administrative remedies, and they therefore did not obtain a final decision on their claims. Contrary to the district court's belief, the mere existence of an administrative procedure for *case-by-case* waiver of the exhaustion requirement did not amount to a *blanket* waiver of exhaustion for all members of the class merely because they presented a constitutional challenge.

B. The district court also erred in including in the class claimants who received a final decision of the Secretary more than 60 days before this class action was filed. None of the unnamed class members requested the Secretary to exercise her authority under 42 U.S.C. 405(g) to extend the 60-day filing period. The district court's view that the running of the 60-day period nevertheless could be judicially "tolled" on a nationwide basis from the date on which a single claimant (appellee Buenta Owens) filed a request for administrative reconsideration would seriously disrupt the sound administration of the Social Security program.

Practical considerations aside, the district court had no authority to impose its unprecedented tolling rule. Like the "final decision" requirement in Section 405(g), the requirement that judicial review be sought within 60 days of "such decision" is a jurisdictional prerequisite to suit that may not be dispensed with by a court. Moreover, limitations on the time within which a suit may be brought against the government must be strictly construed, and therefore a court is not empowered to fashion a tolling rule that Congress has not prescribed.

ARGUMENT

I. CONGRESS RATIONALLY COULD DISTINGUISH BETWEEN WIDOWED SPOUSES AND SURVIVING DIVORCED SPOUSES FOR PURPOSES OF THEIR CONTINUED ELIGIBILITY FOR SURVIVOR'S BENEFITS UPON REMARRIAGE AFTER AGE 60

Throughout the history of the Social Security program, Congress has treated widowed spouses and divorced spouses differently with respect to their eligibility to receive benefits based on their former spouses' earning accounts. This case concerns one aspect of that differing treatment that was in effect between 1979 and 1983. Specifically, effective in January 1979, Congress provided that a widower or widow who remarried after reaching age 60 would retain full eligibility to receive survivor's benefits based on his or her former spouse's account. However, it was not until 1983 that Congress provided that a divorced spouse whose former spouse had died would continue to be eligible for survivor's benefits if he or she remarried after reaching age 60. The district court held that Congress violated the Due Process Clause of the Fifth Amendment because it failed to extend that coverage to divorced spouses in 1979. In the district court's view, since Congress had made both widowed spouses and divorced spouses eligible to receive survivor's benefits when their former spouses died, it was irrational for Congress in 1979 to distinguish between them upon their subsequent remarriage.

This Court has made clear, however, that Congress rationally could determine that divorced husbands and wives depend less on each other than do couples who remain married. *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976). As the district court expressly acknowledged, Congress also rationally could determine that this difference in the degree of dependence continues after the death of the primary wage earner (J.S. App. 42a). If this much is conceded, Congress surely could conclude

that this difference remains even after remarriage, and therefore that only widowed spouses should continue to be entitled to survivor's benefits after they remarry. Contrary to the district court's apparent belief, the fact that Congress, in its discretion, chose to treat widowed spouses and certain divorced spouses in a similar manner for one purpose (their entitlement to survivor's benefits upon the death of the primary wage earner) does not mean that those categories are constitutionally indistinguishable for all purposes or that Congress was somehow estopped from treating them differently as regards their entitlement to survivor's benefits upon remarriage.

A. The Statutory Distinction Must Be Sustained Unless It Is Wholly Irrational

The constitutional principles that govern the resolution of this case are firmly established. "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981).

The distinction involved in this case between widowed spouses and divorced spouses is not inherently invidious. Distinctions based on marital status are common in our legal order, and they manifest both a special regard for marriage as an institution and a practical recognition of the family unit as a common basis for the arrangement of human affairs. *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978); *Maynard* v. *Hill*, 125 U.S. 190, 205, 211 (1888). The statutory provisions at issue likewise do not impinge on the exercise of a fundamental right to marry. As the district court correctly recognized (J.S. App. 5a-7a, 36a-38a), it is only where the government has imposed legal restrictions that significantly and directly interfere

with the decision to enter into marriage that this Court has subjected the governmental action involved to rigorous scrutiny. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Zablocki* v. *Redhail*, 434 U.S. at 386-387. Rules of eligibility for Social Security benefits based on marital status do not have that effect. In fact, this Court already has sustained the constitutionality of the general rule under the Social Security Act that secondary benefits are terminated upon marriage, even though that rule "may have an impact on a * * * beneficiary's desire to marry, and may make some suitors less welcome than others." *Califano* v. *Jobst*, 434 U.S. 47, 58 (1977). See also *Zablocki* v. *Redhail*, 434 U.S. at 386-387 n.12.

Because there are no factors in this case that could trigger heightened scrutiny, the classifications at issue must be sustained under the Due Process Clause unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. at 230; *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 177 (1980). This principle has particular force in a challenge to the distribution of Social Security benefits. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937). As the Court explained in *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960):

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently

arbitrary classification, utterly lacking in rational justification.

The statutory provisions appellees have challenged plainly do not suffer from any such defect.

B. This Court Previously Has Recognized The Rational Basis For The Differing Treatment Of Widowed And Divorced Spouses Involved In This Case

The purpose of the secondary benefit provisions of the Social Security Act is "to afford more adequate protection to the family as a unit" by providing benefits to the members of the wage earner's family who may have become dependent upon him. H.R. Rep. 728, 76th Cong., 1st Sess. 7 (1939); S. Rep. 734, 76th Cong., 1st Sess. 7-9, 11 (1939). See *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 208-209, 213 (1977) (plurality opinion). However, Congress has not adopted a test of eligibility for secondary benefits that requires an individualized showing of need. Instead, it has "elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 52 (footnote omitted).

In this case, each of the two factors upon which appellees' ineligibility for survivor's benefits was based—their divorce and their subsequent remarriage—long has been utilized in determining entitlement to secondary benefits under the Social Security Act, and each already has been sustained by this Court as an independently sufficient basis for distinguishing between classes of potential beneficiaries. It therefore cannot have been irrational for Congress to withhold Social Security benefits from the members of the appellee class because of the presence of *both* of these independently sufficient factors.

1. In *Califano* v. *Jobst*, *supra*, the Court held that the uniform rule prior to 1958, under which Social Security benefits payable to all secondary beneficiaries were automatically terminated upon remarriage, was "unquestion-

ably valid." 434 U.S. at 54. The Court explained (*id.* at 53):

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

In the present context, Congress likewise could rationally conclude that a divorced spouse who remarries is less likely to be dependent upon the resources of his or her former spouse than one who does not remarry. For this reason, Congress's decision to terminate the entitlement of divorced spouses to secondary Social Security benefits if they remarry is plainly rational.

2. The district court did not dispute that Congress constitutionally may terminate a person's entitlement to secondary benefits upon remarriage. But the court held that Congress was foreclosed from doing so after 1979 with regard to surviving divorced spouses who remarry after reaching age 60 because Congress in 1979 permitted widowed spouses who remarry after reaching that age to receive survivor's benefits. The court concluded that Congress could not rationally treat divorced spouses differently (J.S. App. 42a). That holding ignores both the significance Congress long has attached to divorce as it affects eligibility for Social Security benefits and this Court's conclusion that it is constitutional for Congress to do so.

In *Mathews* v. *De Castro*, *supra*, the Court unanimously sustained the constitutionality of provisions of the Social Security Act that provided for the payment of benefits to

a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a *divorced* woman in similar circumstances whose *former* husband has retired or become disabled. The Court explained (429 U.S. at 188):

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

It is clear from *De Castro* and *Boles* that Congress constitutionally could have declined to extend secondary Social Security benefits to *any* divorced spouses. Appellees concede as much (Mot. to Dis. or Aff. 15). In fact, Congress did exactly that for the first 25 years of the Social Security program: although Congress provided benefits for wives and widows in 1939, it was not until 1965 that Congress provided benefits for divorced wives and surviving divorced wives. See pages 4-5, *supra*. If this distinction between spouses who remained married and spouses who were divorced is valid as a general matter, it certainly was not "patently arbitrary" for Congress to invoke that distinction for purposes of determining eligibility for survivor's benefits upon remarriage.

C. Congress's Decision To Permit Certain Divorced Spouses As Well As Widowed Spouses To Receive Survivor's Benefits Upon The Death Of The Primary Wage Earner Did Not Disable Congress From Distinguishing Between Widowed And Divorced Spouses After Remarriage

The district court expressly agreed with the Secretary that, in light of *De Castro* and *Boles*, Congress rationally could assume that surviving divorced spouses are generally less dependent upon the resources of their former

spouses than are widows and widowers (J.S. App. 42a). But the court held that because Congress had chosen to treat widowed spouses and divorced spouses in an identical manner upon the death of the primary wage earner, it could not thereafter distinguish between them if they remarried (*ibid.*). This reasoning is seriously flawed in a number of respects.

1. To begin with, Congress has never treated widowed spouses and surviving divorced spouses "identically" with respect to their eligibility to receive survivor's benefits upon the death of the primary wage earner. Thus, the entire premise of the district court's constitutional ruling is mistaken.

a. Congress in 1965 did not provide for the payment of secondary benefits to *all* divorced women or adopt eligibility criteria that were identical to those applicable to women who remained married. Instead, Congress focused its concern on those divorced women—particularly housewives who had not worked and earned Social Security protection of their own—whose marriages ended after many years, when they might be "too old to build up a substantial social security earnings record even if [they] can find a job." H.R. Rep. 213, 89th Cong., 1st Sess. 92-93 (1965); S. Rep. 404, 89th Cong., 1st Sess. 107-108 (1965). See *Califano* v. *Boles*, 443 U.S. at 291-292 & n.9, quoting S. Rep. 92-1230, 92d Cong., 2d Sess. 142 (1972).[7] Consistent with its particular concern for this limited category of divorced wives, Congress provided in 1965 that a divorced woman could receive secondary benefits (in the form of wife's or widow's benefits) only if she (i) had been married to her former husband for at

[7] As we have explained, Congress in 1965 did not provide for the payment of secondary benefits to divorced husbands and surviving divorced husbands. Those benefits became available only after Congress's omission of them was held unconstitutional in 1977 and 1980 under this Court's decisions addressing statutory distinctions on the basis of sex. Congress thereafter amended the Act in 1983 expressly to provide for such benefits on equal terms. See pages 6-7, *supra*.

least 20 years, and (ii) either received substantial support from him or there was a court order in effect requiring the payment of such support. See page 4, *supra*. By contrast, it was not necessary for a woman who remained married to demonstrate actual dependence in order to receive wife's or widow's benefits, and the duration-of-marriage requirement, which generally was only one year (see 42 U.S.C. (1964 ed.) 416(b) and (c)), had the distinct purpose of protecting against sham marriages entered into for the purpose of receiving benefits. *Weinberger* v. *Salfi*, 422 U.S. 749, 776-780 (1975).[8]

In view of these significant differences in the eligibility criteria, it is obvious that Congress perceived substantial differences in the extent to which divorced spouses and spouses who remained married should be permitted to share in the receipt of benefits from the Trust Fund. Congress accordingly extended that right only to the limited category of divorced wives who it believed were likely to have been the most dependent on their former husbands for support and thus the most deserving of secondary benefits on their former husbands' accounts.

b. This limited category of divorced wives remained Congress's "core concern" in 1972, when it eliminated the requirement that divorced wives show that they received (or were entitled by court order to receive) substantial support from their former husbands. *Califano* v. *Boles*, 443 U.S. at 291-292. Congress determined that the support requirement had proven to be an obstacle to the receipt of benefits by many of the divorced women whom it believed to be the most dependent, because some state divorce laws did not permit alimony and many divorced wives might have accepted a property settlement in lieu of alimony. See *id.* at 292 & n.9; S. Rep. 92-1230, 92d

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[8] A man was required to establish that he received one-half of his support from his wife in order to receive husband's or widower's benefits (see note 1, *supra*), but the duration-of-marriage requirement likewise was only one year. See 42 U.S.C. (1964 ed.) 416(f) and (g).

Cong., 2d Sess. 142 (1972); H.R. Rep. 92-231, 92d Cong., 1st Sess. 54-55 (1971). The purpose of the 1972 amendments therefore was not to place divorced wives generally on a par with women who remained married—a conclusion that is sufficiently evidenced by the fact that Congress in 1972 retained the stringent 20-year duration-of-marriage requirement for divorced wives.

c. In 1977, when Congress enacted the distinction challenged by appellees, it reduced the duration-of-marriage period for divorced wives from 20 years to 10 years. See page 6, *supra*. But even that 10-year requirement was far more stringent than the minimal duration-of-marriage test applicable to wives, widows, husbands, and widowers.

Thus, contrary to the district court's apparent belief (J.S. App. 42a), differing treatment of spouses who were divorced and spouses who remained married continued to be the norm even with regard to *initial* eligibility for benefits when Congress lifted the remarriage rule to a limited extent for widowed spouses effective in January 1979. Congress's decision to distinguish between these two categories at the time of their remarriage thus was fully consistent with, not an irrational departure from, its uniform practice with respect to their initial eligibility.

2. The next flaw in the district court's reasoning was its further premise, also mistaken, that the difference in the eligibility of widowed spouses and divorced spouses after remarriage was a new concept introduced into the Act in 1977. See J.S. App. 34a-35a, 40a. In fact, it was in 1965—in the very amendments in which Congress extended secondary benefits to divorced wives—that Congress first drew such a distinction. In that year, Congress partially lifted the remarriage rule for widows and widowers by permitting them to receive survivor's benefits at a reduced level if they were remarried after age 60. See page 5, *supra*. Congress did not, however, include a similar provision applicable to divorced wives. Thus, the differing treatment of wid-

owed and divorced spouses upon remarriage, like the differing treatment of those two groups with respect to their initial eligibility, was a feature of the Social Security program from the moment that secondary benefits first were extended to divorced wives in 1965. In this respect as well, then, the district court simply misapprehended the statutory scheme it found irrational.

3. The district court's holding not only rests on mistaken premises about the relative eligibilities of divorced spouses and widowed spouses under the statutory scheme. It also is based on a misguided analysis of the consequences of Congress's decision to extend initial eligibility to certain divorced spouses in the first place.

Contrary to the district court's view, the fact that Congress, in its discretion, elected to afford divorced wives who satisfied certain special qualifications a form of protection that was similar to that afforded women who remained married does not mean that Congress actually found these two categories to be *identically* situated in terms of need or dependency or to have an *identical* equitable claim to share in payments from the Trust Fund. Instead, Congress presumably determined in 1965, 1972, and 1977 only that divorced women within the category with which it was specifically concerned were likely to have been dependent upon their former husbands to a sufficient extent (even if not with the *same* degree of likelihood and to the *same* extent as wives who had remained married to the primary wage earner) to warrant treating them in a manner similar to that in which wives and widows were treated. It is entirely consistent with that legislative judgment for Congress nevertheless to have believed that there also were significant differences between spouses who remained married and those who did not. Accordingly, there was nothing irrational about Congress's continuing to give effect to those differences in the 1977 amendments by treating widowed spouses who remarried after reaching age 60 more favorably than divorced spouses who did so.

4. For the reasons explained above, nothing in the Due Process Clause required Congress to take an all-or-nothing approach when it extended coverage to a new category of secondary beneficiaries (divorced spouses) in 1965 or revised the eligibility criteria for that category in 1972 and 1977. Congress often must proceed one step at a time when expanding coverage under this "complex statutory scheme" (*Jobst*, 434 U.S. at 52).

In particular, Congress's consistent practice has been to proceed cautiously in modifying the general remarriage rule under the Social Security Act. See *Jobst*, 434 U.S. at 54-57. Congress adhered to that pattern in 1977. As the district court acknowledged, the House version of the bill enacted in 1977 contained an "across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses"; this was a "broad change" that in its first year of operation alone would have created "an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits" (J.S. App. 3a-4a (footnote omitted), citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I, at 47-48 (1977), and *id.* Pt. II, at 73). No similar provision was contained in the Senate bill, and it is not surprising that the provision was deleted in Conference in favor of a more modest proposal that lifted the marriage rule only for widows and widowers who remarried after reaching age 60. See H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. (1977).

Congress obviously concluded that widows and widowers were the most deserving of receiving benefits after remarriage, and it chose to "concentrate limited funds where the need [was] likely to be greatest" (*Califano* v. *Boles*, 443 U.S. at 296). Recognition of Congress's discretion to make that choice is but a particular application of the broader principle that a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). Accord *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S.

456, 466 (1981); *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).[9]

Congress's decision to include only widowed spouses, and not surviving divorced spouses, in the category of secondary beneficiaries who would retain their eligibility upon remarriage after age 60 is supported not only by the difference between those two groups with respect to their relative dependence on the primary wage earner, but also by a number of other factors:

First, because the principal purpose of secondary benefits is to afford protection for the wage earner's family as a unit (see page 22, *supra*), the distinction between widowed spouses (whose ties to the wage earner's family unit never were broken) and divorced spouses (whose ties to the family unit were legally severed before he died) conforms to the purposes of the statutory program. Compare *Fritz*, 449 U.S. at 177-178 & n.11. It was permissible in this context for Congress to conclude that widowed spouses had a more substantial stake than did divorced spouses in the distribution of survivor's benefits from the Trust Fund after remarriage.

Second, the payment of secondary benefits assists not only the recipient, but also the primary wage earner, who is thereby assured that protection is provided for his or her family members. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Califano* v. *Goldfarb*, 430 U.S. at 203-205 (plurality opinion). Congress rationally could determine that when a divorced spouse remarries, the former spouse no longer is primarily responsible for his

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[9] See, *e.g.*, 123 Cong. Rec. 39132 (1977) (remarks of Sen. Long) (the Conference agreement "represents a compromise between the [House and Senate] positions which * * * preserved most of the savings and which also includes those benefit improvements which were of highest priority"); *id.* at 39011 (remarks of Rep. Conable) (the bill "moves in the right direction, by improving ever so slightly the treatment of widows and divorcees"); *ibid.* (remarks of Rep. Archer) ("it is a step forward to permit widows and widowers over 60 years of age to remarry without losing their benefits").

or her support and that the divorced spouse instead should look to the new spouse, not to the former spouse's Social Security insurance, for any necessary support. It is common, for example, for alimony and support payments to a divorced spouse to be terminated when that spouse remarries. See, *e.g.*, Cal. Civ. Code § 4801(b) (West Supp. 1985); Ill. Ann. Stat. ch. 40, § 510(b) (Smith Hurd Supp. 1985); N.J. Stat. Ann. § 2A:34-25 (West 1952); N.Y. Dom. Rel. Law § 248 (McKinney 1977). Especially since the eligibility of divorced spouses for secondary benefits originally was based on their receipt of or entitlement to support or alimony payments, it was reasonable for Congress to conform to the common practice regarding such payments by providing for the termination of secondary Social Security benefits when a divorced spouse or surviving divorced spouse remarried. Cf. *Salfi*, 422 U.S. at 776-777.

By contrast, a widow or widower who remarries does not typically forfeit her or his entitlements deriving from the former marriage—such as an interest in the deceased spouse's estate. It therefore was rational for Congress to permit widowed spouses who remarried after reaching age 60 likewise to continue to receive Social Security benefits based on the deceased spouse's account, even though it did not do so for divorced spouses.

Third, benefits paid to divorced spouses and surviving divorced spouses are not subject to or counted against the overall ceiling on the amount that may be paid on the basis of the primary wage earner's account. 42 U.S.C. 403(a)(3)(C). As a result, if the primary wage earner remarried after his divorce, his or her new spouse and former spouse both might be eligible for the full amount of secondary benefits. It was reasonable for Congress to terminate that potential drain on the Trust Fund at whatever point the divorced spouse or surviving divorced spouse remarried.

4. In sum, as this Court observed in a nearly identical context in *Califano* v. *Jobst*, 434 U.S. at 57-58:

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [(1950)]. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the [appellees].

Congress might well be deterred from taking similar steps in the future to alleviate what it believes to be the greatest inequities in the Social Security program if its decisions to proceed in a cautious fashion are invalidated because they do not go far enough. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). This faith in the democratic process was vindicated in the present case, because Congress enacted legislation to eliminate the distinction appellees challenged almost 18 months *before* the district court declared that distinction unconstitutional. There was no justification for the district court to intervene in the complex legislative adjustment and evolution of the respective eligibility of spouses who remained married and spouses who were divorced.

II. THE DISTRICT COURT HAD NO JURISDICTION UNDER 42 U.S.C. 405(g) OVER THE CLAIMS OF THE UNNAMED CLASS MEMBERS WHO DID NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES OR WHO RECEIVED THE SECRETARY'S "FINAL DECISION" MORE THAN 60 DAYS BEFORE THIS SUIT WAS FILED

The district court compounded its error on the constitutional issue by granting relief to a nationwide class of surviving divorced spouses whose claims for benefits were not properly before the court. This suit was brought pur-

suant to 42 U.S.C. 405(g), which authorizes an individual to obtain judicial review only of the Secretary's "final decision" on his claim for benefits, and only if a civil action is commenced "within sixty days of the mailing to him of notice of such decision or within such further time as the Secretary may allow." The named appellees, Buenta and Kenneth Owens, satisfied the prerequisites to judicial review set forth in Section 405(g), because the Secretary formally designated the decision denying their claims at the reconsideration level as her "final decision," and each then sought judicial review within 60 days. See pages 10-11, *supra*. The district court therefore properly exercised jurisdiction over the claims of Buenta and Kenneth Owens and reached the merits of the constitutional question in connection with their individual suits.

However, the district court plainly lacked jurisdiction over the claims of the individuals who were included as unnamed members of the class. The district court conceded that in order for a class to be properly certified, each of its members must individually have satisfied the requirements for judicial review prescribed by 42 U.S.C. 405(g). J.S. App. 15a-16a, citing *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975). Accord *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part). Yet the district court proceeded to certify a class in complete disregard of the explicit requirements in Section 405(g) that each claimant must have received a "final decision" of the Secretary on his own claim for benefits and must have sought judicial review within 60 days of that final decision.

A. The District Court Lacked Jurisdiction Over The Claims Of The Unnamed Class Members Who Did Not Fully Exhaust Their Administrative Remedies Through The Appeals Council Stage Or Otherwise Obtain A "Final Decision" Of The Secretary

1. As this Court has held, the existence of a "final decision" by the Secretary is "central to the requisite

grant of subject matter jurisdiction" in 42 U.S.C. 405(g). See *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); accord *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14. Congress did not specify in the Social Security Act itself when the Secretary will be deemed to have rendered her "final decision" on a claim for benefits. The meaning of that term "is left to the Secretary to flesh out by regulation," and she may "specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (*Salfi*, 422 U.S. at 766 & n.9 (footnote omitted)).

As the Court repeatedly has recognized, the governing regulations specify that the finality required for judicial review is achieved only after the claimant has pressed his claim through the ALJ and Appeals Council stages of the administrative review process. *Salfi*, 422 U.S. at 765; *Mathews* v. *Eldridge*, 424 U.S. 319, 329 (1976); *Ringer*, slip op. 2. See 20 C.F.R. 404.900(a)(5); page 8, *supra*.[10] There is no allegation in the complaint in this case that each of the unnamed class members obtained a "final decision" from the Appeals Council. The district court therefore "was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal." *Salfi*, 422 U.S. at 764.

Instead of ordering dismissal of the complaint to that extent, however, the district court excused all of the unnamed class members from complying with the exhaustion requirement. The court did so because, in its view, exhaustion would have been futile (J.S. App. 18a-19a). The district court's action was flatly inconsistent with *Salfi*. There, the Court held that the requirement that the Secretary have rendered her "final decision" on the individual's claim for benefits is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed

[10] The background of the exhaustion requirement is discussed in greater detail in the brief for the petitioners (at 19-25) in *Heckler* v. *City of New York*, No. 84-1923. We have furnished counsel for appellees with a copy of our brief in *City of New York*.

with merely by a judicial conclusion of futility" (422 U.S. at 766 (emphasis added)). The Court so held even though the plaintiffs in *Salfi*, like the appellees in this case, filed suit to challenge the constitutionality of a provision of the Social Security Act—a legal issue that was beyond the Secretary's competence to decide.[11]

2. The Court did observe in *Salfi* that "[w]hile a *court* may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, * * * it would be inconsistent with the congressional scheme to bar the *Secretary* from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final' within the language of § 405(g)." 422 U.S. at 766-767 (emphasis added). The Court held that the Secretary properly could dispense with exhaustion in *Salfi* itself because the claimant expressly stated that he had no dispute with the Secretary's findings of fact or application of the relevant provisions of the Social Security Act, and the Secretary had deter-

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[11] The district court observed that "[t]he Third Circuit has interpreted *Salfi* as establishing that if the only issue in a case is a legal issue of constitutionality, no exhaustion is required." J.S. App. 18a, citing *Kuehner* v. *Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), vacated and remanded, No. 83-1593 (Nov. 5, 1984), and *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-346 (3d Cir. 1977). Given this Court's explicit holding to the contrary in *Salfi*, we find it incomprehensible that the lower courts could read *Salfi* to support the proposition that a court may dispense with the exhaustion requirement, even over the Secretary's objection, simply because a question of the constitutionality of the Act is involved.

As we explain below, what the Court actually held in *Salfi* is that the Social Security Act does not prohibit the *Secretary* from dispensing with the requirement of full exhaustion through the Appeals Council stage if *she* has determined that all other issues have been resolved and that the only issue remaining is the constitutionality of a provision of the Act. That holding was but a particular application of the controlling principle that the Act leaves to the Secretary the determination of what will be regarded as her "final decision." It is only in this limited sense that the Court in *Salfi* held that exhaustion is not "required" when a constitutional issue is presented.

mined that the only remaining issue concerned the constitutionality of a particular provision of that Act. See 422 U.S. at 764-765, 766-767. The Court explained (*id.* at 765-766 (emphasis added)):

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. See, e.g., [*McKart* v. *United States*, 395 U.S. 185, 193-194 (1969)]. Plainly these purposes have been served once the *Secretary* has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the *Secretary's* administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.

The Court recognized in *Salfi* that 42 U.S.C. 405(g) contemplates that the Secretary will have rendered her final decision only "after a hearing" and that the Secretary had not held a hearing on the particular claims involved in that case. 422 U.S. at 767. But the Court also recognized that "once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide," a hearing would be "futile and wasteful." *Ibid.* Accordingly, the Court held that just as the Secretary may award benefits without requiring a hearing, the statute likewise does not "prevent him from similarly determining in favor of the applicant, without a hearing, all issues with

regard to eligibility save for one as to which he considers a hearing to be useless" (*ibid.*).

Thus, the Court made clear in *Salfi* that the determination whether to dispense with a hearing, like the determination of what constitutes the Secretary's final decision," is the responsibility of the Secretary, not the courts. The Secretary has the express authority under 42 U.S.C. 405(b) to conduct a hearing even if the claimant believes that one is not necessary. That Section not only requires the Secretary to afford the claimant an opportunity for a hearing; it also authorizes the Secretary, "on his own motion," to "hold such hearings * * * as he may deem necessary or proper for the administration" of the program. This provision ensures that even where the constitutionality of a provision of the Social Security Act appears to be in issue, the Secretary will have the opportunity, prior to judicial review, to resolve any factual issues that may linger after the reconsideration stage or to dispose of any other issues that may support either an allowance or denial of the claim but that were not previously considered.[12]

3. Following the decision in *Salfi*, the Secretary promulgated regulations that establish a procedure by which the Secretary may dispense with the requirement of ex-

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[12] Governing regulations provide that if the claimant believes that an oral hearing is unnecessary in his case, he may request the ALJ to decide it on the written record. 20 C.F.R. 464.948(c). The ALJ is required to give such cases "immediate attention." If the ALJ agrees with the claimant, after a review of the file, that an oral hearing is not necessary, he is expected to issue his decision within 30 days of his receipt of the claims file. Social Security Administration, U.S. Dep't of Health and Human Services, *Office of Hearings and Appeals Handbook* Pt. 1, § 1-313(4) (Apr. 1982). See also *id.* Pt. 2, § 2-1331. Thus, even where the Secretary has not dispensed with the ALJ hearing stage altogether, as she did in the cases of appellees Buenta and Kenneth Owens, the completion of that stage may be expedited if the ALJ determines in the circumstances of the particular case that an oral evidentiary hearing is not necessary. However, the ALJ is still required in such a case to render a decision applying the law to the undisputed facts.

haustion through the Appeals Council stage in the circumstances identified in *Salfi*—*i.e.*, where the Secretary has specifically determined that the facts bearing on the particular claim for benefits are not in dispute, the claimant agrees with the Secretary's interpretation of the Act, and the only issue barring payment is a statutory provision that the claimant contends is unconstitutional. 20 C.F.R. 404.926; see page 9, *supra*. In promulgating these regulations, the Secretary explained that where the specified conditions have been satisfied, SSA could be confident that the particular claim for benefits had been presented at a sufficiently high level to afford the agency an opportunity to correct its errors; to have a complete record with respect to the facts, law, and possible alternative bases of entitlement; and to ensure national uniformity. 40 Fed. Reg. 53385 (1975). Compare *Salfi*, 422 U.S. at 765-766. Accordingly, the Secretary determined that if the claim has been scrutinized to this extent, further administrative review would be "clearly futile." *Ibid.*[13]

The procedures the Secretary has prescribed thus assure that the question of exhaustion of administrative remedies will itself be presented to and expressly ruled upon by the Secretary and that judicial review will be available at what would otherwise be an interlocutory stage of the administrative review process only on the basis of a specific determination by the Secretary that the particular claim involved need not be reviewed further. The existence of this administrative procedure also guarantees that the claimant and the Secretary will have

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[13] A request to use the expedited appeals procedure will be denied if SSA determines that the claimant does not satisfy all of the requirements for invoking it. 20 C.F.R. 404.928. In accordance with the Court's admonition in *Salfi* that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (422 U.S. at 766), the Secretary has specified that the denial of a claimant's request to pursue the expedited appeals procedure "will not be subject to the right to administrative or judicial review." 40 Fed. Reg. 53385 (1975). See 20 C.F.R. 404.902(k).

formally stipulated to the fact that further exhaustion may be dispensed with *prior* to the claimant's filing of an action in court. That formal stipulation will then make it unnecessary for the parties to engage in the sort of wasteful litigation on the exhaustion question that has occurred in this case and unnecessary for a court to attempt to infer from what might otherwise be ambiguous circumstances whether the Secretary regarded a particular decision rendered prior to the Appeals Council stage as her "final decision." Compare *Salfi*, 422 U.S. at 764-765, 767; *Mathews* v. *Diaz*, 426 U.S. 67, 72-73, 75-77 (1976). By the same token, there is no substantial burden imposed on the claimant by the requirement that he request the Secretary formally to designate the reconsideration determination as her "final decision" before he seeks judicial review.

The special procedure operated as intended to facilitate expedited judicial review of the claims of appellees Buenta and Kenneth Owens. There was nothing to prevent any of the unnamed class members from likewise requesting to use this expedited appeals procedure if they also wanted to challenge the constitutionality of the relevant provisions of the Social Security Act and if there were no other factual or legal issues in dispute on their respective claims. But there is no indication that any of them ever did so. Nor, as we have said, is there any allegation that any of those class members pursued their administrative remedies and obtained a decision from the Appeals Council. The most reasonable inference is that they simply abandoned their claims once they learned that the Act precluded the payment of benefits. Perhaps they—unlike Buenta and Kenneth Owens—believed that the statutory bar that had been brought to their attention was constitutional. That was their decision to make in the separate administrative proceedings each had initiated by filing his own claim for benefits, just as a party who has filed a lawsuit in court has the right to decide what issues to raise and whether to aban-

don his lawsuit. But whatever their reasons for not pursuing their claims, when the unnamed class members allowed the 60-day period for seeking further review at any stage of those administrative proceedings to expire, the individual decisions denying their respective claims for benefits became binding upon them. The district court had no authority to order that they be opened. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

4. The district court held, however, that the mere existence of the expedited appeal regulations somehow amounted to a blanket waiver of the exhaustion requirement by the Secretary for all claimants who challenge the constitutionality of a provision of the Social Security Act (J.S. App. 17a-18a). The court therefore concluded that it had jurisdiction over the claims of all of the class members despite their procedural defaults in failing to seek further review on their own individual claims within the 60 days allowed. This conclusion was clearly wrong.

The district court's ruling completely ignored the terms and purposes of the governing regulations, which establish a procedure for expedited administrative appeals on a *case-by-case* basis. This Court has never endorsed the district court's sweeping proposition that the Secretary may be held to have waived exhaustion for all unnamed members of a nationwide class, even though the Secretary has not made the particularized determination required by those regulations (and contemplated by *Salfi*) that further exhaustion is unnecessary on each individual claim for benefits. Exhaustion is not merely a technical requirement in these circumstances; it is an essential feature of the procedure by which the Secretary conclusively resolves any disputed questions of law or fact bearing on a particular claim for benefits, and thereby renders her final administrative judgment on that claim. The expedited appeals procedure enables the Secretary to render such a judgment without the need for an Appeals Council decision. As a result, if a court then holds that

the statutory provision on which the denial of benefits rested is indeed unconstitutional, all that will remain on remand to the Secretary is the payment of benefits, since all other issues would have been resolved in the prior administrative proceedings.

In this case, by contrast, the Secretary did not formally stipulate with respect to each of the unnamed class members, as she did for Buenta and Kenneth Owens, that all issues of fact and law bearing on his individual claim for benefits (other than the constitutional issue) had been finally resolved at what would otherwise have been a preliminary stage of the administrative review process. Accordingly, she did not conclusively determine that each such claimant had been married for the requisite length of time to an insured wage earner, that the claimant remarried only after reaching age 60, that there were no other bases of eligibility or ineligibility, and that the only remaining obstacle to payment was the applicable statutory provision that Buenta and Kenneth Owens challenged in this case. The Secretary therefore had not rendered her final administrative judgment on the claims of those unnamed class members (but only because the claimants involved did not ask her to do so, and instead abandoned their claims).

As a consequence of that default, the district court found it necessary to order the Secretary to reopen those closed claims and to adjudicate these other issues before it could be determined whether the individuals involved actually were entitled to the benefit of the court's constitutional ruling. See J.S. App. 46a. However, the statutory condition that judicial review is available only following the Secretary's "final decision" made "after a hearing" required that those issues be resolved *before* the district court could even assume jurisdiction over any individual class member's claim for benefits. Because this fundamental prerequisite of a "final decision" was lacking, the district court had no jurisdiction over the claims of the unnamed class members, and it was without au-

thority to order the Secretary to reopen and readjudicate them.

B. The District Court Lacked Jurisdiction To Award Relief To Class Members Who Received A Final Decision Of The Secretary More Than 60 Days Before This Suit Was Filed

The district court included in the certified class any individual who happened to have had a claim for benefits pending before SSA on or after August 20, 1982, even though Buenta Owens did not file this class action until April 19, 1983, almost eight months later (J.S. App. 19a-22a). This aspect of the class certification flies in the face of the requirement in 42 U.S.C. 405(g) that judicial review of the Secretary's final decision on an individual's claim for benefits must be sought "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

1. The Secretary has promulgated regulations establishing a procedure for the exercise of her authority under 42 U.S.C. 405(g) to extend the 60-day filing period. Under those regulations the claimant first must file a written request with SSA, stating the reasons why he did not seek judicial review within the time allowed. The filing time then will be extended for that claimant if SSA determines that he has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911. There is no indication that any of the class members who received a "final decision" more than 60 days before this suit was filed ever requested the Secretary to extend the filing period pursuant to this procedure. The claims of those class members therefore remain time-barred.

2. The district court nevertheless excused these class members from the requirement that they seek judicial review within 60 days. The court concluded that the running of the 60-day period should be deemed to have been

"tolled" on a nationwide basis from the date on which Buenta Owens requested administrative reconsideration of her claim because, in the court's view, that request sufficiently put the Secretary on notice of the constitutional issue (J.S. App. 21a-22a).[14] This is a truly extraordinary notion that, if accepted by this Court, would wreak havoc in the orderly administration of the Social Security Act.

The rationale adopted by the district court apparently would eliminate the filing deadline whenever a number of claims for benefits raise a common issue of law—a routine occurrence in the administration of a program under which millions of claims are filed annually. And it would do so despite the fact that the individuals excused from meeting the 60-day requirement almost invariably would not have the slightest inkling that another claimant, perhaps at the other end of the country, had raised a similar legal issue in administrative proceedings on a wholly separate claim. This casual and haphazard approach to what Congress intended to be a firm filing deadline would fatally undermine the congressional purpose of eliminating stale claims and establishing repose with respect to the thousands of individual benefit claims that are processed each month. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). Compare *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 9; *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8.

Quite aside from the devastating impact of the district court's unprecedented tolling rule, the court clearly had no authority to impose it.[15] "[T]he United States, as

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[14] The district court did not explain of what value the notice of the constitutional issue would have been to the Secretary, since that issue was beyond her competence to resolve. See *Salfi*, 422 U.S. at 765, 767.

[15] The only appellate authority the district court cited for this novel "tolling" rule was the Ninth Circuit's decision in *Lopez*

sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite" to suit. 422 U.S. at 766. The requirement that an action for judicial review be commenced within 60 days of the mailing of "such decision" appears in the same sentence as the requirement of a "final decision," and it therefore likewise is a limitation on the subject matter jurisdiction of the district court. Accordingly, a court has no authority to proceed where that 60-day requirement has not been met. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985), petition for cert. pending, No. 85-474; *Hunt* v. *Schweiker*, 685 F.2d 121 (4th Cir. 1982); *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982); *Whipp* v. *Weinberger*, 505 F.2d 800, 801 (6th

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v. *Heckler*, 725 F.2d 1489, 1506-1507 (1984). See J.S. App. 21a-22a. However, this Court unanimously granted a stay of the portion of the judgment in *Lopez* that asserted jurisdiction over the claims of class members who did not satisfy the 60-day filing requirement (*Heckler* v. *Lopez*, No. A-707 (Apr. 30, 1984)), and the court of appeals' decision thereafter was vacated by this Court. *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984).

The district court also relied on class action cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (J.S. App. 21a-22a). That reliance was wholly misplaced. Under Title VII, it is not necessary for each class member to file a charge with the EEOC. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). Under the Social Security Act, on the other hand, each individual member of a class must file a claim for benefits. *Weinberger* v. *Salfi*, 422 U.S. at 764. When he does so, the exhaustion rule, time limitations and other requirements of the Act and implementing regulations apply to the ensuing administrative and judicial review of that individual claim, and those requirements leave no room for the intrusion of tolling notions by a court.

Cir. 1974). Compare *Block* v. *North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 287 (1983); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). But see, *e.g.*, *City of New York* v. *Heckler*, 742 F.2d 729, 737-738 (2d Cir. 1984), cert. granted, No. 84-1923 (Oct. 7, 1985); *Mental Health Ass'n* v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983).[16]

Even if the 60-day requirement in 42 U.S.C. 405(g) were not regarded as a jurisdictional prerequisite in the strictest sense, that consequence would furnish no support for the district court's novel "tolling" rule in this case. Statutorily mandated limitations on the time within which a person may bring suit against the government must in any event be strictly construed, and the courts are not at liberty to fashion tolling rules for which Congress has not provided. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). The fact that Congress expressly vested in the Secretary, not the courts, the authority to extend the 60-day filing period where circumstances warrant makes it particularly clear that Congress intended to foreclose the fashioning of duplicative tolling rules by the courts. Cf. *United States* v. *Locke*, slip op. 9 n.10.

The district court's holding on the 60-day issue also is directly contrary to this Court's ruling in *Califano* v. *Sanders*, *supra*. See *Heckler* v. *Lopez*, 464 U.S. at 881 (Stevens, J., dissenting in part). If a claimant does not seek review within 60 days, he may obtain further consideration of his claim only by requesting the Secretary to reopen the adverse administrative decision. See 20 C.F.R. 404.987-404.995. This Court held in *Sanders* that the Secretary's determination not to reopen an adverse decision that the claimant had allowed to become binding

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[16] We have discussed the jurisdictional nature of the 60-day filing requirement at greater length in the brief for the petitioners (at 41-45) in *City of New York*.

is not subject to judicial review.[17] The Court explained in *Sanders* that a holding permitting judicial review of the Secretary's denial of a request to reopen would "frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"—a limitation that the Court regarded as an aspect of a "policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims." 430 U.S. at 108. The nationwide tolling rule fashioned by the district court in this case would frustrate that congressional policy choice far more severely than would judicial review of the denial of an individual request to reopen, which the Court foreclosed in *Sanders*.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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DECEMBER 1985

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[17] The holding in *Sanders* applies a fortiori where, as here, a district court is asked to exercise jurisdiction over hundreds of time-barred claims of individual claimants who never requested the Secretary to reopen their claim and, indeed, never even personally requested the court to do so.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 202(e) of the Social Security Act, as in effect when this action was filed and as codified at 42 U.S.C. 402(e), provided in relevant part:

> **Widow's insurance benefits**
>
> (1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
>
> (A) is not married,
>
> (B) (i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (5),
>
> (C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title, or
>
> (ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65, and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

shall be entitled to a widow's insurance benefit for each month, * * *.

* * * * *

(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

3. Section 202(f) of the Social Security Act, as in effect when this action and as codified at 42 U.S.C. 402 (f), provided in relevant part:

Widower's insurance benefits

(1) The widower (as defined in section 416(g) of this title) of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423 (d) of the title) which began before the end of the period specified in paragraph (6),

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title,

(D) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit for each month, * * *.

* * * * *

(5) If a widower, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

4. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides:

Judicial review

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of

this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

5. Section 216(d) of the Social Security Act, as in effect when the action was filed and as codified at 42 U.S.C. 416(d), provided in relevant part:

Divorced wives; divorce

(1) The term "divorced wife" means a woman divorced from an individual, but only if she had been married to such individual for a period of 10 years immediately before the date the divorce became effective.

(2) The term "surviving divorced wife" means woman divorced from an individual who has died, but only if she had been married to the individual for a period of 10 years immediately before the date the divorce became effective.

* * * * *

(4) The terms "divorce" and "divorced" refer to a divorce a vinculo matrimonii.

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No. 84-1905

In The

Supreme Court of the United States

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

BUENTA M. OWENS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Central District Of California

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QUESTIONS PRESENTED

Under the Social Security Act, both widowed spouses and surviving divorced spouses were entitled to survivor's benefits based on the work records of the deceased wage earners, but, in the event of remarriage, the Act treated the two classifications of surviving spouses differently. The questions thus presented are:

1. Whether the district court correctly held that the Social Security Act's prohibition against the payment of benefits to surviving divorced spouses who remarried at age 60 or over, while widowed spouses were eligible without regard to remarriage at age 60 or over, violates the equal protection component of the due process clause of the Fifth Amendment.

2. Whether the district court properly certified a nationwide class by recognizing that, since the undisputed sole issue on the merits was the constitutionality of the statutory scheme, the class could include applicants who did not exhaust administrative remedies or seek judicial review within sixty days prior to the filing of this lawsuit.

PARTIES TO THE PROCEEDINGS

Since the filing of the Brief for the Appellant, Margaret M. Heckler has been replaced by Otis R. Bowen. He is now Secretary of Health and Human Services and the appellant in this matter.

The appellees are correctly named in the Brief for the Appellant.

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No. 84-1905

In The

Supreme Court of the United States

October Term, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Appellant,

v.

BUENTA M. OWENS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Central District Of California

BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

A. STATUTORY AND REGULATORY FRAMEWORK

1. Substantive provisions

a. Benefits for divorced spouses: In 1939, Congress amended the Social Security Act to authorize benefits for individuals other than wage earners themselves. At that time, these "secondary" benefits were made available to wives, dependent children, widows, and surviving dependent parents. Ch. 666, §201, 53 Stat. 1364-1366. Congress later extended secondary benefits to dependent husbands

and widowers as well. Ch. 809, §101(a), 64 Stat. 483, 485 (1950).[1]

Also in 1950, Congress created a category of secondary beneficiaries defined as "former wife divorced". Ch. 809, §104(a), 64 Stat. 511. The definition required a woman to be the mother of a deceased wage earner's child. Like widows in that situation, a "former wife divorced" was eligible for "mother's benefits" if she had not remarried and if she was dependent on the wage earner. Ch. 809, §101(a), 64 Stat. 485-486 (1950). By this addition, Congress was carrying out its "intention of paying benefits to individuals who have actually been dependent upon a deceased worker. . . ." S.Rep. No. 1669, 81st Cong., 2d Sess. (1950), reprinted in [1950] U.S. Code Cong. & Admin. News 3317.

In 1965, benefits were authorized for divorced wives and widows who could prove dependency on the wage earner. Pub. L. No. 89-97, §§308(a), 308(b)(1), 79 Stat. 375-377. A "divorced wife" and "surviving divorced wife" were defined as a woman "who had been married to the [wage earner] for a period of 20 years immediately before the date the divorce became effective." Pub. L. No.

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[1]As the Secretary's brief sets out, Congress often excluded men from some secondary benefits, or imposed eligibility conditions on them to which women were not subject. These unconstitutional provisions have generally been corrected as the result of decisions by this Court. The statutes at issue in this case do not expressly discriminate on the basis of gender. Because the great majority of survivors harmed by the challenged scheme are female, however, see *infra*, at 20 n.8, this discussion will focus primarily on benefits available to women. References in this brief which are not gender-neutral reflect only the reality of the challenged scheme's overwhelmingly greater impact on women.

89-97, §308(c), 79 Stat. 377. These benefits were in recognition of the fact that, although the divorced wife "had been dependent upon the worker for much of his working lifetime," marriages often "end in divorce after many years, when the wife is too old to build up a substantial social security earnings record even if she can find a job." S.Rep. No. 404, 89th Cong., 1st Sess. (1965), reprinted in [1965] U.S.Code Cong. & Admin. News 2047. Remarriage terminated entitlement, except where the marriage was to a man receiving certain secondary benefits. Pub. L. No. 89-97, §308(a), 79 Stat. 375-376.

The requirement that divorced wives and widows demonstrate actual dependency was eliminated seven years later. Pub. L. No. 92-603, §§114(a), (b), 86 Stat. 1348 (1972). Congress took this step because "the support requirements of the law have operated to deprive some divorced women of the protection they should have received." H.Rep. No. 92-231, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S.Code Cong. & Admin. News 5041.

In 1977, Congress changed the definition of divorced spouses by reducing the required duration of the marriage. It was disturbed that the twenty-year rule deprived many deserving divorced people of "any Social Security protection." H.Rep. No. 95-702, Part I, 95th Cong., 1st Sess. 48 (1977). The new definition required ten years of marriage. Pub. L. No. 95-216, §337, 91 Stat. 1548.

b. Remarriage rule: Originally, entitlement to secondary benefits terminated on marriage, §202(e) (1) (A) of the Act, 53 Stat. 1365 (1939); §202(f) (1) (A), 64 Stat. 485 (1950), but, in 1958, Congress determined that widows and widowers who remarried certain other secondary beneficiaries would not forfeit their survivor's benefits. Pub.

L. No. 85-840, §§307(b), (e), 72 Stat. 1031. The exception was intended to "eliminate the hardship" caused by the general rule. S.Rep. No. 2388, 85th Cong., 2d Sess. (1958), reprinted in [1958] U.S. Code Cong. & Admin. News 4233.

In 1965, Congress allowed widows and widowers 50% of the wage earner's benefit when they remarried someone other than another secondary beneficiary. Pub. L. No. 89-97, §§333(a) (1), (b) (1), 79 Stat. 403, 404. This change was premised on the legislative judgment that the old rule had "an undesirable result in that widows (and widowers) who would like to remarry do not do so because if they did they would lose their social security benefits." S.Rep. No. 404, *supra*, reprinted in [1965] U.S.Code Cong & Admin. News 2049; see also *id.* at 1958.

Concern about the harsh effects of the remarriage rule resurfaced in 1977 when Congress observed that it was causing some beneficiaries to lose all or part of their entitlement if they remarried. The House Ways and Means Committee was "especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses)." H.Rep. No. 95-702, Part I, *supra*, at 48. It therefore recommended that the remarriage rule be eliminated for selected categories, so that remarriage would not affect entitlement for either widows or surviving divorced widows. *Ibid.* The Senate disagreed with the resulting House bill, however and the conference committee, without explanation, adopted a compromise—elimination of the remarriage penalty only for widows and widowers. H. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977). Accordingly, effective January 1, 1979, widows and widowers maintained their survivor's benefits if they remarried at age 60 or over. Pub. L. No. 95-216, §§336(a) (3), (b) (3), 91 Stat. 1547, amending §§202(e) (4) and (f) (5) of the Act.

In 1983, after this action was filed, Congress eliminated the remarriage rule for divorced spouses. Therefore, as of January 1, 1984, surviving divorced spouses remained entitled to survivor's benefits if they remarried at age 60 or over. Pub. L. No. 98-21, §§131(a) (2), (a) (3) (A), (b) (2), (b) (3) (A), (d) (1), 97 Stat. 92, 93.

2. **Procedural provisions**

Pursuant to 42 U.S.C. §§405(a), (b), the Secretary has created an administrative procedure for reviewing benefit claims under the Social Security Act. This often protracted process consists of four steps: an "initial determination", a paper review called "reconsideration", a hearing before an administrative law judge, and a final discretionary review by the "Appeals Council". 20 C.F.R. §§404.900 - 404.983. After a decision at one level, the claimant has sixty days in which to seek review at the next step. Following a "final decision" by the Secretary, the claimant is authorized by 42 U.S.C. §405(g) to obtain review in federal court. This can be done individually or on behalf of a class.

In the usual case involving application of the Act to an individual fact pattern, the final decision follows exhaustion of the administrative process, and the appeal must be filed in federal court within sixty days of that decision. In specified circumstances, however, completion of the lengthy administrative process has been held to be pointless, wasteful, or even harmful, and adherence to the exhaustion and 60-day requirements has not been required.

The Secretary waives exhaustion by recognizing that he cannot or will not resolve an issue critical to the bene-

ficiary's claim. An expedited procedure for constitutional claims, the prototype of this situation, is set out in the regulations. 20 C.F.R. §§404.923-404.928. The courts may also find that exhaustion is inappropriate. Factors bearing on this decision include the degree to which the critical contentions are collateral to issues raised in routine claims and the potential harm to the claimant which may result from requiring completion of the administrative process.

Similarly, strict application of the 60-day statute of limitations may be determined inappropriate. This occurs in the same circumstances and for the same reasons that exhaustion of administrative remedies is waived, and comports with the equitable exceptions applicable to all statutes of limitations.

B. PROCEEDINGS IN THIS CASE

1. The administrative process

a. Buenta Owens married Russell Judd in 1937; after nearly thirty-one years of marriage, they were divorced. Russell Judd later died, and, when she was 61, Buenta Owens was remarried, to Kenneth Owens. J.S. App. 31a.

On July 30, 1982, she applied for benefits as the surviving divorced wife of Russell Judd. Her claim was denied on August 27, 1982 because she was married. On October 19, 1982 she sought reconsideration of that decision on the ground that the differential treatment of widows and divorced widows was unconstitutional, and expressly requested that the expedited review process for constitutional claims be employed. In its Reconsideration Determination of December 7, 1982, the Social Security

Administration (SSA) ignored the constitutional argument, and determined that it had properly followed the statute by denying the claim because of her marriage to Kenneth Owens. B.R. 7, 9-10.

Two months later, SSA sent Mrs. Owens a short document entitled "Agreement". By its terms, Mrs. Owens and the Secretary agreed that the only disputed issue was the constitutionality of 42 U.S.C. §§ 402(e)(1)(A), (4), and that, but for those provisions, "the right of the claimant to benefits has been established by the claimant." The agreement also acted as "a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeals process." Mrs. Owens signed it on February 11, 1983, and a representative of the Secretary signed on March 3, 1983. J.S. App. 32a, 50a-51a; B.R. 2-3.

On April 19, 1983, she filed this action in the Central District of California, contending that the challenged statutory scheme was violative of the guarantees of equal protection and seeking to represent a nationwide class of similarly situated surviving divorced spouses. J.S. App. 14a-15a.

b. Kenneth Owens was married to Dorothy Owens for over thirty-four years, divorcing in 1978. Dorothy Owens later died. At the age of sixty, Kenneth Owens married Buenta Owens. J.S. App. 32a.

On July 15, 1982, Mr. Owens filed an application for survivor's benefits on the wage record of his deceased former wife. Five months later, his claim was denied, due to his remarriage. On February 11, 1983, he sought reconsideration on the ground that the statutory scheme

was unconstitutional; he also requested the expedited administrative process. Three months later, his reconsideration request was denied. Although SSA acknowledged that a request for an expedited appeal had been received, he was informed that he would again be required to "file a written request" to avail himself of that route. That request was made immediately, on May 18, 1983. J.S. App. 32a; K.R. 12-18, 28-29.

Nearly five months later, in October, 1983, Mr. Owens received his "Agreement", which substantially duplicated Mrs. Owens'. He signed and returned it, and, on November 23, 1983, over nine months after his request for expedited review, the agreement was signed by a representative of the Secretary. J.S. App. 32a, 52a-53a; K.R. 1, 4-5.

His lawsuit, virtually identical to his wife's, was filed in the Central District of California on January 6, 1984, and was later consolidated with her case. J.S. App. 15a.

2. **The merits**

On December 23, 1983, before Mr. Owens' complaint was filed, the district court ruled in the Secretary's favor. Applying the rational basis test, the court rejected the Secretary's reliance on *Mathews v. de Castro*, 429 U.S. 181 (1976), as that case dealt only with the issue of dependency during the lifetime of the wage earner. J.S. App. 9a. Judge Byrne recognized that the analysis must focus on remarriage:

> "In order [for the Secretary] to prevail on an assertion of varying dependence, the Court must find logical reasons why surviving divorced spouses *on remarriage* are less dependent upon a now deceased primary wage earner than are widows *on remarriage*."

Id. at 10a (emphasis in original). Although he could find "[n]o tenable basis for such a distinction" (*ibid.*), he upheld the scheme on the ground that Congress was always free to move one step at a time, without regard to the irrationality of the step which it took. *Id.* at 10a-11a.

Mrs. Owens moved for reconsideration under Rule 59, and Mr. Owens moved for summary judgment. In a new decision dated October 5, 1984, the district judge acknowledged his error, noting that "Congress must have a rational basis for each step it takes." *Id.* at 40a. He reviewed the disparate treatment of the two classifications, and found no basis for Congress to assume

> "that, on remarriage, surviving divorced spouses become less dependent than widows. . . . Whatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, those differences would likely be erased by marriage."

Id. at 42a. Accordingly, the district court entered judgment on December 26, 1984, declaring the challenged provisions unconstitutional and enjoining their continued application to the appellee class. *Id.* at 44a-46a.

3. Class certification

On August 28, 1984, prior to ruling on Mrs. Owens' Rule 59 motion, the district judge granted the motion for class certification. *Id.* at 13a-28a. He rejected most of the Secretary's contentions that 42 U.S.C. § 405(g) should strictly limit the size of the class. See J.S. App. 15a-23a. In particular, he determined that, since neither the facts nor the Secretary's interpretation of the statute were in dispute, and since the Secretary's regulations expressly provided for waiver of exhaustion in that circumstance,

the Secretary had waived exhaustion. *Id.* at 17a-18a. Furthermore, because the only issue on the merits was the constitutionality of the challenged provisions, the court held that it should exercise its authority to waive exhaustion. *Id.* at 18a-19a.

Judge Byrne also concluded that the 60-day statute of limitations was tolled by the filing of Buenta Owens' request for reconsideration of the initial administrative decision. That action gave the Secretary "adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." *Id.* at 22a. The district court thus defined the class to include all those who had live claims on or after August 20, 1982, which was sixty days prior to the request for reconsideration. See *id.* at 44a.

SUMMARY OF ARGUMENT

I. A. For several reasons, the disparate treatment of divorced and non-divorced widows upon remarriage should be analyzed under a standard of review more demanding than the rational basis test. First, the rationales offered by the Secretary are the products of government attorneys, not of legislative reasoning. See *Schweiker v. Wilson*, 450 U.S. 221, 244-245 (1981) (Powell, J., dissenting). Secondly, these rationales are based on policy considerations, not concerns for the fiscal soundness of the program; accordingly, the low level of scrutiny employed in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), is not appropriate. *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974). Thirdly, the classificatory distinction is based on divorce, suggesting that Congress was unthinkingly re-

flecting a tradition of disfavor rather than engaging in reasoned analysis. In the main, this disfavor is rooted in society's historical disapproval of divorced women, who are the overwhelming victims of the classificatory scheme.

B. Congress has at all times premised survivor's benefits on assumptions of probable dependency. For the same reason, it also authorized benefits for divorced women. Furthermore, Congress clearly expressed the judgment that survivors should not be penalized and discouraged from remarrying by the denial of survivor's benefits. In light of these goals, and the legislative recognition that both divorced and non-divorced widows were dependent at the death of the wage earner, the Secretary must explain what significant (yet never articulated) difference Congress relied upon to rationalize disparate treatment of divorced and non-divorced widows at remarriage.

The Secretary cites *Califano v. Jobst*, 434 U.S. 47 (1977) and *Mathews v. de Castro*, 429 U.S. 181 (1976) as validating all distinctions involving marriage and divorce. But the holdings in those cases do not control this situation, which is concerned with discrimination amongst those who marry, and with survivor's benefits, not wife's benefits.

C. Contrary to the Secretary's contention, the district judge did not misunderstand the statutory scheme. He correctly recognized that, in the context of the categories which Congress defined as entitled, there was no basis for distinguishing between the two groups of surviving spouses on the basis of remarriage, a factor unrelated to the acknowledged premise for their entitlement, dependency. Prior discrimination against divorced wid-

ows and differences in categorical definitions are not relevant to the issue posed by the disparate treatment of two classifications for which Congress had previously discerned an equivalence in dependency.

The challenged scheme cannot be upheld solely on the ground that Congress may move one step at a time; there must be a valid rationale for whatever step is taken. Nor is there any basis for contending that Congress distinguished between the classifications out of fiscal concerns. In Social Security terms, the amount at issue was minuscule, and the Court should reject contentions of that nature when there is no supporting evidence.

The Secretary does not explain why widows have a greater stake in survivor's benefits after remarriage than do divorced spouses. This hypothesis is contradicted by the recognized dependency of both groups on the wage earner at death, and no logic suggests a differential change in dependency upon remarriage.

The Secretary's attempt to rationalize the discrimination as paralleling the effect of remarriage on alimony is misplaced. The distinction in this case is between survivors of wage earners, so that principles drawn from contexts involving a living wage earner are meaningless. At bottom, the Secretary's rationale is nothing more than the perpetuation of stereotyped images of widowed and divorced women, with one rewarded for her behavior and the other penalized. In any event, even if some minor distinction between the classifications were imaginable, it could not provide a sufficient basis to undercut the legislative determination that survivors should be encouraged to remarry.

The Secretary's after-the-fact rationales, with no supporting legislative history, are inadequate explanations, for they contradict the clearly expressed Congressional recognition of the dependency of surviving widows (divorced and non-divorced) and the equally explicit policy judgment that survivors should not be discouraged from remarrying.

II. A. This Court has always analyzed the Secretary's actions to ascertain his true position on exhaustion of administrative remedies in constitutional challenges. In three cases, the Court concluded that the Secretary had waived exhaustion by conceding, in various informal ways, that the challenged statute required denial of the claim.

The Secretary's formal waiver of exhaustion for the named plaintiffs in this case was a more comprehensive recognition of the Secretary's incompetence to provide relief, and certainly no less a concession. Since all class members would have been eligible for benefits except for the challenged statute, the concession logically applied to them as well. The district court thus correctly effectuated this Court's "practical" approach to exhaustion by interpreting the Secretary's actions as a waiver.

The district judge's alternative analysis, waiving exhaustion himself, was also correct, as the Secretary was incapable of providing relief to the class members.

B. Relying on this Court's explicit holdings, the district court concluded that the 60-day provision in 42 U.S.C. § 405(g) was a statute of limitations, subject to tolling. The Secretary, however, contends that only those satisfying the rule's literal terms may be included within the class. But this Court has previously recognized that neither the venue nor the exhaustion rules of § 405(g) are

to be interpreted literally. Furthermore, this Court has refused to read § 405(g) literally to preclude class relief and injunctive relief, and has construed it broadly to cover constitutional challenges as well as routine cases. The district court's interpretation of § 405(g) also comports with the language of the provision itself, which reflects an intended flexibility by permitting extensions of the 60-day period.

The district court's analysis follows general pronouncements that limitations periods should be analyzed in light of the legislative purposes behind the given statutory scheme. This Court has thus refused to apply a literal interpretation of a limitations period in the remedial context of Title VII, expressly recognizing the propriety of waiver and tolling. In applying a similar analysis to another remedial statute, the Court noted that the limitations period was not intended to "shield" the government.

The remedial purposes of the Social Security Act and beneficiaries' understandable difficulties in comprehending their rights under the Act, especially where constitutional claims are involved, militate in favor of similar flexibility in this situation. To reject these practical approaches will render class certification nearly impossible in Social Security cases, thus preventing claimants with legitimate grievances from obtaining relief from constitutional violations.

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ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT NO TENABLE BASIS EXISTS FOR DISTINGUISHING UPON REMARRIAGE BETWEEN SURVIVING SPOUSES AND SURVIVING DIVORCED SPOUSES

A. In the circumstances of this case, the Court should carefully scrutinize the Secretary's purported rationales

Under the rational basis test, "the classificatory scheme chosen by Congress [must] rationally advance[] a reasonable and identifiable governmental objective...." *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981); see also, *e.g., Hooper v. Bernalillo County Assessor*, 105 S.Ct. 2862, 2866 (1985).[2] The test is "not a toothless one", *Mathews v. Lucas*, 427 U.S. 495, 510 (1976), and, accordingly, the Court has invalidated various discriminatory classifications.[3]

In this case, the district court applied the rational basis test, and found the challenged scheme incapable of satis-

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[2]The precise contours and proper application of the test have been the subject of considerable disagreement. See, *e.g., U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 176 n. 10 (1980) (noting inconsistent applications of the test); *City of Cleburne, Tex. v. Cleburne Living Center*, 105 S.Ct. 3249, 3261 (1985) (Stevens, J., concurring) (suggesting that the various levels of review are, in fact, "a continuum of judgmental responses"); *id.* at 3265 (Marshall, J., concurring in part, dissenting in part) (terming majority's application of the test precedent which will "subject economic and commercial classifications to similar 'ordinary' rational basis review. . . .")

[3]*E.g., Hooper v. Bernalillo County Assessor, supra; Williams v. Vermont*, 105 S.Ct. 2465 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 438, 443 (1982) (Blackmun, J., separate plurality opinion) (Powell, J., concurring in the judgment).

fying that level of scrutiny. J.S.App. 38a-42a. The Secretary urges this Court also to employ the rational basis analysis, but to rule that the classification passes that test. Brief for the Appellant (hereinafter, "See.Br.") 21. Appellees agree with the district court that no rationale supports the classificatory scheme under the rational basis test, but there are several reasons for employing a more demanding review of the Secretary's contentions.

First, as the standard articulated in *Wilson* indicates, the legislature's objective must be both "reasonable and identifiable." That latter requirement is a crucial aspect of the inquiry:

> "'[W]e must discover a correlation between the classification and either the actual purpose of the statute or a legitimate purpose that we may reasonably presume to have motivated an impartial legislator.'"

City of Cleburne, Tex. v. Cleburne Living Center, 105 S.Ct. 3249, 3261 n.4 (1985) (Stevens, J., concurring) (citation omitted).[4] In this case, no reason for the distinction is apparent from the legislative history. See *supra*, at 4. The Secretary—or, rather, his attorneys—have therefore been left to devise rationales after the fact. But these speculations, without more, do not provide a sufficient basis on which to presume legislative motivation; there must be some plausible connection to the Congressional action. The Court must therefore look carefully at the

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[4]See also, e.g., *Wilson*, 450 U.S. at 243-244 (Powell, J., dissenting) ("an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature intended to serve"); *id.* at 244 n. 6; *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 & n. 16 (1975).

government's suggested rationales to determine whether they may have reasonably motivated the legislature.

In *Wilson*, the four-Justice minority, faced with a similarly empty slate from which to devine legislative intent, expressly suggested a more rigorous review in situations of this type:

> "[T]he Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history. When no indication of legislative purpose appears other than the current position of the Secretary, the Court should require that the classification bear a 'fair and substantial relation' to the asserted purpose. . . . This marginally more demanding scrutiny indirectly would test the plausibility of the tendered purpose, and preserve equal protection review as something more than 'a mere tautological recognition of the fact that Congress did what it intended to do.'"

450 U.S. at 244-245 (Powell, J., dissenting) (footnote and citations omitted).[5] In this instance, where the Secretary's attorneys have concocted a spate of rationales at the district and appellate levels in an effort to support the discriminatory scheme, the approach suggested by the *Wilson* minority is particularly appropriate. There will be no interference with the legislative process, for the Court's review is not of Congressional goals, but only of "the ingenuity of a government lawyer." *Id.*, at 244 (Powell, J., dissenting).

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[5]See also *Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662, 682 n.3 (1981) (Brennan, J., concurring in judgment); *Jimenez v. Weinberger*, 417 U.S. 628, 633 (1974) (rejecting suggested rationale on ground that there is "no evidence" to support it).

A second reason to test the scheme by reference to a more careful scrutiny lies in the nature of the arguments offered by the government. In circumstances where a program's fiscal solvency is the motivating factor in the distribution of benefits, this Court has applied the lowest level of review. See, *e.g.*, *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 175-177 (1980); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). But, where the purpose is not "to achieve a necessary allocation of finite resources, . . . *Dandridge* is distinguishable and not controlling." *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974).

In this case, the government relies on policy, not fiscal, arguments.[6] There is no indication that Congress excluded divorced widows from the exception to the remarriage rule in order to protect finite resources. Accordingly, application of the minimal scrutiny employed to review the classifications in *Dandridge* is no more appropriate here than in *Jimenez*.

The third reason for a more demanding review inheres in the definitive characteristics of the disfavored class. The characteristic which both distinguishes the disfavored from the favored, and also purports to justify the differential treatment, is divorce. The Secretary's arguments are all premised on an assumption that it is

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[6]The Secretary does briefly suggest that Congress may have been motivated by fiscal concerns when it declined to eliminate the remarriage rule for divorced widows as well. Sec. Br. 29, 31. The evidence (see *infra*, at 28-29) demonstrates, however, that the amount at stake was so minimal that it could not reasonably be viewed as the motivating factor. *Jimenez v. Weinberger*, *supra*, 417 U.S. at 633.

permissible to treat divorced people as less deserving than those who remain married.[7] While there may be valid reasons, in some contexts, to favor individuals who remain married over those who do not, the analysis in each instance must be undertaken with a recognition of society's historically negative view of those who divorce. See, *e.g.*, Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, at xvii (1985). Justice Stevens' recent admonition is particularly apt in this instance, where a characteristic has been regularly cited as the basis for disparate treatment:

> "The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a 'tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification.'"

City of Cleburne, 105 S.Ct. at 3261 n. 6 (citation omitted).

The assumption that divorced people are less deserving is undoubtedly grounded in the traditional view of divorced women in particular. The term "divorcee" is now out of vogue, but society's perception of women throughout this nation's history indicates that "part of the 'baggage of sexual stereotypes'. . . ." (*California v. Westcott*, 443 U.S. 76, 89 (1979) (citation omitted)) is the double standard applied to women who divorce. Indeed, as will be discussed *infra*, at 31, one of the Secretary's rationales for this discrimination is merely a camouflaged version

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[7] "Congress obviously concluded that widows and widowers were the most deserving of receiving benefits after remarriage. . . ." Sec.Br. 29.

of the offensive and archaic notion that divorced women are less worthy individuals. See William Goode, *After Divorce* 182-184, 246 (1956).[5]

Justice Stevens' concern that "[h]abit, rather than analysis" (*City of Cleburne*, 105 S.Ct. at 3261 n. 6) may inform legislative decisions is of special importance in this case, where the written record is blank as to Congress' actual intentions. It suggests the prototypical instance in which a legislature, traditionally inclined to favor one classification over another, acquiesces in a common assumption without acknowledging the significance of its collective act.

The classificatory scheme at issue is not the inevitable result of drawing a line which must be drawn. See, *e.g.*, *Fritz*, 449 U.S. at 179. Here, the line was the product of a political compromise, drawn expressly to disfavor divorced people. Whatever the political value of compromise, the guarantees of equal protection must ensure that the deal which is struck is not irrational. The Court should therefore carefully consider whether, in the context of *this* program, the "tradition of disfavor" provides a legitimate, rather than an habitual, basis for discriminatory treatment.

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[5]That the discrimination overwhelmingly affects women is documented by SSA statistics which show the numbers of women and men receiving surviving spouse's benefits, and, thus, by extrapolation, indicate the distribution by gender of divorced surviving spouse's benefits. In the 1983-1984 period, of the just over 1,000,000 new widow/widower beneficiaries, only 3.5% were men. Social Security Administration, *Social Security Bulletin, Annual Statistical Supplement, 1984-85*, Table 57, p. 122.

B. Prior decisions of this Court do not validate the scheme in this case, which runs counter to the purposes of survivor's benefits, of benefits for divorced spouses, and of continuing benefits after remarriage

1. In *de Castro*, this Court stated that "the primary objective [of the Social Security system] was to provide workers and their families with basic protection against hardships created by the loss of earnings due to illness or old age." 429 U.S. at 185-186 (footnote omitted). For secondary benefits, dependence was the key for carrying out this objective: "[T]he general scheme of OASDI shows that dependence on the covered wage earner is the critical factor in determining beneficiary categories." *Califano v. Goldfarb*, 430 U.S. 199, 213 (1977) (plurality opinion) (footnote omitted). Individualized determinations were rejected in favor of using "simple criteria . . . to determine probable dependency." *Califano v. Jobst*, 434 U.S. 47, 52 (1977) (footnote omitted); see also, *e.g.*, *Mathews v. Lucas*, *supra*, 427 U.S. at 508-509.[9]

In particular, this approach was applied to surviving spouses; assumptions of dependency were the benchmark of their entitlement. *Califano v. Boles*, 443 U.S. 282, 289 (1979); *Goldfarb*, 430 U.S. at 214. Similarly, dependence on the wage earner also was the crucial factor in the allocation of benefits to divorced women. Indeed, originally, divorced women had to demonstrate actual dependency, but this requirement was eliminated in 1972. See *supra*, at 3. Congress was concerned that the proof-of-support require-

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[9]In making dependency the critical component for entitlement, Congress rejected need as a relevant consideration. *de Castro*, 429 U.S. at 186-187; *Goldfarb*, 430 U.S. at 213 & n.11.

ment was preventing deserving divorced women from receiving benefits, see, *e.g.*, S.Rep. No. 92-1230, 92d Cong., 2d Sess. 142 (1972), as this Court has observed. *Boles*, 443 U.S. at 291. In short, as with all survivors, divorced surviving spouses were recognized as probably dependent on the wage earner and therefore entitled to survivor's benefits.

The legislative purpose in continuing benefits to survivors who remarry has also been clearly expressed; it was an effort to eliminate the "undesirable result" of discouraging survivors from remarrying. S.Rep. No. 404, *supra*, reprinted in [1965] U.S.Code Cong. & Admin. News 2049; see also H.Rep. No. 95-702, Part I, *supra*, at 48. Ultimately, Congress eliminated this "penalty" for everyone, including the divorced. H.Rep. No. 98-25, 98th Cong., 1st Sess. 34 (1983).

Congress thus determined that widows and divorced widows were entitled to survivor's benefits due to their equivalent dependence on the wage earner. In light of that legislative recognition, it is questionable whether *any* other event could suffice to distinguish between the two classifications. But remarriage is a particularly inapt factor on which to premise differential treatment. The logic of eliminating the punishment for remarrying is no less applicable to the divorced survivor than to the non-divorced survivor.

For the Secretary to prevail, therefore, Congress must have reasonably determined both that the dependence of a divorced survivor was more likely to terminate at remarriage than would that of a widow and also that that eventuality provided a sufficient rationale to penalize only divorced widows for remarrying. As the district judge

observed, however, the Secretary "has been unable to present a logical basis for this distinction. . . ." J.S. App. 42a.

2. The Secretary ignores the specifics of this case, devoting his attention instead to general statements about marriage and divorce which bear little relevance to the classificatory scheme at issue. This Court's recognition that divorce and marriage can each work changes in an individual's relationship with others does not, as the Secretary would have it, provide an automatic basis for distinguishing between widows and divorced widows in every context.

As he did below, the Secretary cites *Jobst* and *de Castro* as determinative of the issue. Sec.Br. 22-24. In the former, this Court approved of "the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried." 434 U.S. at 53. From this holding, the Secretary infers legitimacy for any rule, involving any classification of beneficiary, which distinguishes on the basis of marriage. Sec.Br. 23.

But the *Jobst* holding has no reference to the effect of remarriage on a surviving spouse; it describes only the presumed result from the marriage of a dependent child. More important, the *Jobst* language relied upon by the Secretary does not support distinctions *amongst* those who marry; rather, it explains the logic of distinguishing between those who marry and those who do not. Thus, even if the Secretary's leap of faith were correct, that *Jobst* validates all distinctions based on marriage, it would not support the distinction in this case: it cannot explain why remarriage for widows should have a different result than remarriage for surviving divorced spouses.

Reliance on *de Castro* is equally misplaced. This Court's approval of the disparate treatment of divorced wives was premised on a wife's need for extra benefits to assist in the care of a retired husband, a need which does not exist for the divorced wife. See 429 U.S. at 188. That reasoning has no relevance in the survivor situation, where there is no living spouse for whom additional benefits are needed. See J.S. App. 9a. *de Castro* does not provide a basis for distinguishing in every instance between the divorced and non-divorced, any more than *Jobst* automatically validates all distinctions based on marital status.

Furthermore, as with *Jobst*, the Secretary's broad application of limited language (Sec.Br. 24, quoting 429 U.S. at 188) ignores the legislative scheme at issue in this case. Congress expressly determined that, in *this* context, divorce was not a relevant consideration: the death of the wage earner eliminated any differences in dependency between divorced and non-divorced spouses. *de Castro* does not provide an explanation for repudiating that determination upon remarriage.

In this case, as in *Jobst*, there is no dispute about the legitimacy of the general rule which deprived remarrying survivors of their entitlement. The Secretary's task, as in *Jobst*, is to rationalize a limited exception to that rule: the authorization of benefits only to widows who remarry. Instead, the Secretary merely recites the general rule as the basis for not extending the exception to divorced widows who remarry. Unlike, in *Jobst*, the Secretary can offer no valid explanation for applying the exception to one classification, but not to another.

C. The Secretary can provide no reasoned basis for exempting only one classification of surviving spouses from the burden of the remarriage rule when Congress has already recognized the equivalence which exists after the death of the wage earner

1. The Secretary seizes on the district court's statement that "Congress decided to treat the two groups identically upon death of the primary wage earner" (J.S. App. 42a) as the linchpin of his attack. He devotes much of his argument to an effort to refute that analysis (Sec.Br. 25-28), apparently in the belief that, if the two classifications are not identical, Congress was free to treat them differently in every conceivable context. But this approach ignores a crucial premise of equal protection analysis: "Permissible discriminations between persons must bear a rational relationship to their *relevant* characteristics." *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (emphasis in original); see also, *e.g., Hooper v. Bernalillo County Assessor*, *supra*, 105 S.Ct. at 2869 (in light of purpose of program, date of residence is not relevant factor for distinguishing amongst veterans). In this case, the relevant characteristics of widows and divorced widows require similar treatment upon remarriage.

Based on his explanation of the benefits available to divorced women (Sec.Br. 25-27), the Secretary argues that the district judge misunderstood the statutory scheme, with the result that "the entire premise of [his] constitutional ruling is mistaken." *Id.* at 25. There is no indication, however, that Judge Byrne misapprehended the scheme. That his decisions do not detail every development in survivor's benefits implies, if anything, only a recognition that the omitted aspects were not pertinent. More important,

neither appellees nor the district court have suggested that members of the two classifications were identical at all times and in every context. Congress defined the category of divorced women which it determined should be entitled to benefits, just as it also defined the categories of wives, widows, and others whom it judged should be entitled. Those definitions necessarily have some differences, but the differences do not validate all distinctions in treatment. The issue here is whether those whom Congress did define as entitled beneficiaries of the survivor's program could be distinguished on the basis of a factor unrelated to the recognized bases for their entitlement.

Furthermore, Congress' 1965 extension of partial benefits to widows who remarried (see Sec.Br. 27-28) demonstrates only that Congress discriminated against divorced women at that time as well. In 1977, it continued and exacerbated the disparate treatment. If anything, the 1965 action emphasizes the habitual assumption that divorced widows are properly subject to harsher treatment than their married counterparts.[10]

The district court's conclusion is accurate. When Congress bestowed full benefits on all spouses, divorced and not divorced, at the death of the wage earner, it recognized the equivalence of their positions. The same factor motivating survivor's benefits for widows—probable dependency—also motivated survivor's benefits for divorced widows. In short, Congress determined that the *relevant*

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[10]As in 1977, Congress did not offer any explanation in 1965 for its discrimination against divorced widows who remarry. See S.Rep. No. 404, *supra*, reprinted in [1965] U.S. Code Cong. & Admin. News 2047-2049.

characteristics of the two classifications were indistinguishable. Recognizing that, the district court correctly summarized the contradiction inherent in the denial of benefits to one classification at remarriage:

> "Congress would have to have had some logical reason to believe that widowed and surviving divorced spouses have the same degree of dependency at the time of the primary wage earner's demise, but that, on remarriage, surviving divorced spouses become less dependent than widows."

J.S. App. 42a. That inconsisteney remains unexplained by the Secretary.

2. In finally trying to offer at rationale for the scheme (Sec.Br. 29-31), the Secretary first suggests that, in light of fiscal concerns, Congress could reasonably move one step at a time. As the district judge recognized, however, "Congress must have a rational basis for each step it takes." J.S. App. 44a; see also *id.* at 29a. Thus, he noted that, in *Wilson*, *Jobst*, and *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this Court had found an "independent rational basis" for its action. See also, *e.g.*, *Westcott*, 443 U.S. at 88-89; *Geduldig v. Aiello*, 417 U.S. 484, 495 (1974). A legislature's right to move gradually does not permit it to draw the line wherever it chooses or to legitimize its action as accomplishing what it set out to accomplish: "This Court still has an obligation to view the classificatory *system*, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary." *Logan*, 455 U.S. at 441 (Blackmun, J., separate plurality opinion) (emphasis in original; footnote omitted). If Congress were free to move one step at a time, without demonstrat-

ing the propriety of *that* move, equal protection review would indeed be toothless.[11]

The contention that Congress was motivated by fiscal concerns (Sec.Br. 29, 31) is unsupportable. The Secretary cites the district court's reference to the 1977 legislative history which suggested a $1.3 billion cost for eliminating the remarriage rule for all secondary beneficiaries. *Id.* at 29. But he neglects to note the more detailed legislative history (also cited by the district judge), which estimated the annual cost of extending benefits to three categories of remarrying survivors as less than $50 million and termed the long-range cost "negligible". J.S. App. 4a n.4, 35a n.5, citing S.Rep. No. 98-23, 98th Cong., 1st Sess. 17 (1983).

Even the $50 million figure is misleadingly high. The chart accompanying the Senate Report estimated the six-year cost of providing benefits to the three remarrying categories (of which surviving divorced spouses were one) as less than $100 million, an annual cost of under $17 million. S.Rep. No. 98-23, *supra*, at 17; see also *id.*, at 73-74. Since surviving divorced spouses account for only a portion of that figure, the amount attributable to them is lower still.[12]

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[11] *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) and *New Orleans v. Dukes*, 427 U.S. 297 (1976), cited by the Secretary (at 29-30) in support of his one-step-at-a-time argument, are not contrary to appellees' position. They confirm that a legislature may move gradually, but they also note a rational basis for the move that was made. See 449 U.S. at 466; 427 U.S. at 305.

[12] In 1976, of the 3,862,000 beneficiaries in the "widows and widowers" category, only 21,000 were surviving divorced wives. There were only 66,000 "remarried widows". Social Security

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The Social Security system is immense. From 1979 through 1983, its payments were over $675 *billion*. Social Security Administration, 48 *Social Security Bulletin* 11 (Nov. 1985), Table M-1, p. 25. If the annual cost of paying benefits to remarrying divorced surviving spouses had been even as high as $17 million (but see *supra*, at 28), that would represent only .01% of the system's average annual outlay. The amount at stake was negligible; as in *Jimenez*, "there is no evidence supporting the contention that [inclusion of the disfavored class] would significantly impair the federal Social Security trust fund. . . ." 417 U.S. at 633. Congress could not reasonably have been motivated by financial considerations.

The Secretary also posits that, "because the principal purpose of secondary benefits is to afford protection for the wage earner's family as a unit," Congress could conclude that widowed spouses "had a more substantial stake . . . in the distribution of survivor's benefits . . . after remarriage." Sec.Br. 30. The Secretary does not explain the reasoning by which the conclusion purportedly follows from the premise, and none is apparent. Congress had already decided that both classifications were dependent on the wage earner, thus warranting equal treatment as survivors. And there is no evidence indicating that re-

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Administration, *Social Security Bulletin, Annual Statistical Supplement, 1976*, Table 104, p. 150. These figures corroborate the Congressional statistics indicating the relative pittance which would have been paid to divorced widows who remarried. Moreover, in an affidavit filed in the district court after this appeal was taken, the Secretary estimated that the total amount owed to all class members is only $5.6 million. Affidavit of Jack Gallagher, ¶ 12 (June 17, 1985), filed in *Owens v. Heckler*, Nos. 83-2436, 84-154 (C.D.Cal.).

marriage by a widow alters her relationship to the wage earner differently than does remarriage by a divorced widow. Once having decided that divorce and death were not sufficient bases on which to treat a divorced widow differently, Congress could not reasonably conclude that remarriage would effect such a distinction.

In addition, the Secretary hypothesizes a rationale based on the allegedly different economic ties to the wage earner of widows and divorced spouses. Sec.Br. 30-31. Since alimony ceases at remarriage, he suggests, it was reasonable for Congress to stop survivor's benefits at that point. To begin with, the argument is based on pure speculation.[13] But, it also suffers from a fundamental fallacy in logic. Distinctions between widows and divorced spouses (rather than surviving divorced spouses) are neither at issue in this case, nor instructive in comprehending legislative motivation. Thus, Congress' alleged "reliance" on alimony as a guiding principle is meaningless; alimony terminates at the wage earner's death, while Social Security benefits for divorced spouses do not.[14]

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[13]A 1975 study showed that "only 14 percent of divorced women were awarded alimony and of this 14 percent only 46 percent were collecting regularly." National Commission on the Observance of International Women's Year, " . . . *To Form a More Perfect Union* . . ." 16 (1976). It would have been entirely unreasonable for Congress to premise its action on a factor which was only true for 6.4% of divorced women.

[14]Moreover, as the Secretary acknowledges (Sec.Br. 31), Congress eliminated proof of support, including alimony, as a condition for divorced spouse's benefits. See *supra*, at 3. Having determined that actual dependency was not a proper consideration in the award of survivor's benefits, Congress could not reasonably have concluded that that factor should be determinative at remarriage.

Principles of distribution drawn from situations involving living wage earners have no applicability in this situation, where both the favored and disfavored classifications are eligible precisely because the wage earner has died. Congress had already determined that there was no relevant distinction between the classifications at the death of the wage earner. The Secretary's reliance on concepts involving a living wage earner is grossly misplaced.

His strained hypothesis also has the ironic result of rewarding the widow who, he assumes, is still living off the wage earner's estate (Sec.Br. 31), while the divorced woman ultimately has neither the presumed estate nor survivor's benefits. Aside from its illogic, this conjecture perpetuates society's traditionally moralistic comparisons between divorced and married women. The widow is "entitled" to remarry; accordingly, she should retain survivor's benefits (as well as her first husband's estate). The "divorcee," however, should suffer if she has the temerity to remarry. Congress, so the Secretary maintains, could reasonably determine that divorced women should be punished for remarrying, while widows should be encouraged.

There is no reasonable basis on which to presume that survivors who did not divorce are more likely to be dependent on their deceased husbands when they remarry. If any distinction in dependency between survivors existed, it could only logically be recognized at the death of the wage earner, not upon the occurrence of an event which is unrelated to the relationship between the wage

earner and the survivor.[15] The Secretary is not free to offer questionable rationales for legislative action, when, in fact, Congress does not view the allegedly distinguishing characteristic as relevant.[16]

The Secretary's effort to devise a rationale suffers from another fatal weakness. Even if some marginal distinction between the classifications could be conjured up, the Secretary does not and cannot explain how this distinction could support differential treatment in light of the remarriage rule. Congress expessly stated its concern that remarriage should not be discouraged. That public policy is violated no less in denying benefits to divorced widows than to those who are not divorced. *Accord, Williams v. Vermont*, 105 S.Ct. 2465, 2472 (1985); *Zobel v. Williams*, 457 U.S. 55, 61 (1982); *Califano v. Westcott*, 443 U.S. 76, 86-87 (1979). No rationale can explain singling out one classification when the overriding policy is equally applicable to both:

> "The term 'rational' . . . includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose *that transcends the harm to the members of the disadvantaged class.*"

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[15]Indeed, as the district court noted, "[w]hatever dependency differences might exist between widowed spouses and surviving divorced spouses upon the death of the wage earner, *those differences would likely be erased by marriage.*" J.S.App. 42a (emphasis supplied).

[16]*Cf. Roe v. Wade*, 410 U.S. 113, 161-162 (1973) (state cannot defend criminal abortion statute on ground that fetus is human being when, in every other context, fetus is not recognized as person until birth).

City of Cleburne, 105 S.Ct. at 3261 (Stevens, J., concurring) (emphasis added; footnote omitted). Given Congress' clearly stated goal, the Secretary's reliance on vague and speculative concepts cannot be accorded serious consideration.

3. The Secretary has devised several explanations after the fact for this discrimination. But the government's "rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis." *Logan*, 455 U.S. at 442 (Blackmun, J., separate plurality opinion). The purpose of survivor's benefits for both divorced and non-divorced widows and the policy of not discouraging remarriage have been clearly articulated. Where the legislature's overall goal is apparent, and the only explanation for a discriminatory exception to that goal rests on flimsy and unsupportable speculation, it is illogical to rely on the latter. See, *e.g.*, *Wiesenfeld*, 420 U.S. at 648 & n.16.

No reasoned basis exists for distinguishing amongst surviving spouses at remarriage. The discriminatory scheme was merely an expedient political compromise, and, in all likelihood, an unthinking and traditional response based on archaic prejudices against divorced women. The district court thus correctly concluded that no valid rationale supported the discrimination.

II. CLASS CERTIFICATION SHOULD NOT BE GOVERNED BY AN IMPRACTICAL AND UNNECESSARILY RESTRICTIVE READING OF SECTION 405(g)

A. The district court correctly concluded that the Secretary waived exhaustion

The district court held that further exhaustion of administrative remedies was not necessary because, "under the Secretary's own regulations, the exhaustion requirement is waived." J.S. App. 18a. Those regulations provide a mechanism by which the Secretary waives further exhaustion if the issue raised is solely constitutional. 20 C.F.R. §§ 404.923 - 404.928. Both Buenta Owens and Kenneth Owens secured agreements from the Secretary waiving further exhaustion and conceding that "[t]he sole issue in dispute is the application of [the challenged] sections . . . of the Social Security Act." J.S. App. 50a, 52a. The Secretary contends, however, that, despite his formal acknowledgement of the futility of further exhaustion, membership in the class required each individual also to obtain a formal waiver. Under the Secretary's reasoning, this holds true even though all class members raised only the issue of the constitutionality of the statutory scheme.

On three occasions, this Court has been faced with jurisdictional questions in cases where the plaintiffs challenged the constitutionality of a provision of the Social Security Act. *Califano v. Goldfarb, supra; Mathews v. Diaz*, 426 U.S. 67 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975). In each instance, the Court concluded that, as a practical matter, the Secretary had waived further exhaustion. Because the Secretary is not competent to address constitutional challenges, the Court recognized that

"further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest." *Salfi*, 422 U.S. at 765-766.

In each case, this Court carefully scrutinized the Secretary's actions in order to ascertain his true position. In *Salfi*, it focused upon the Secretary's decision not to

> "raise any challenge to the sufficiency of the allegations of exhaustion in appellees' complaint, . . . interpret[ing] this to be a determination by him that for purposes of this litigation the reconsideration determination is 'final.'"

Id. at 767.

Similarly, in *Diaz*, the Court reviewed the Secretary's recognition that the plaintiff's applications "raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation;" this was considered sufficient to satisfy the requirements of 42 U.S.C. § 405(g). 426 U.S. at 72-73; see also *id.* at 76-77. Even though the Secretary had moved to dismiss the complaint for failing to exhaust administrative remedies, the Court viewed his overall posture as a waiver of exhaustion. *Id.* at 72.[17]

In *Goldfarb*, the plurality[18] cited the improbability of the existence of facts which would alter the solely consti-

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[17]The *Diaz* analysis was recently reaffirmed in *Heckler v. Ringer*, 104 S.Ct. 2013, 2024 n.11 (1984), where the Court noted the special circumstances inherent in purely constitutional challenges under § 405(g).

[18]By concurring in the judgment, Justice Stevens implicitly agreed that the district court had correctly exercised jurisdiction over the claim pursuant to § 405(g). 430 U.S. at 217 (Stevens, J., concurring in the judgment).

tutional nature of the challenge. The Secretary had stated that the denial of the application was based upon the failure to meet the requirements of the challenged provision. That recognition formed a sufficient basis to conclude that exhaustion had been waived. 430 U.S. at 203 n.3.[19]

In all three cases, the Secretary lacked the power to address the challenge even if he was so inclined, but this fact, by itself, was not the basis for finding further exhaustion futile. Exhaustion was still required as long as there was a realistic possibility that the claim might be decided on another issue. *Salfi*, 422 U.S. at 765. But, once the Secretary had conceded that the claim over which he lacked competence was controlling, further exhaustion was futile. This was true whether the Secretary's concession occurred during the administrative proceedings, as in *Goldfarb*, or in court, as in *Salfi* and *Diaz*. Accordingly, even though the facts fell "short of meeting the literal requirement of § 405(g)," exhaustion was not viewed as a precondition to the exercise of the court's jurisdiction. *Salfi*, 422 U.S. at 765.

This reasoning is equally applicable here. The Secretary explicitly decided to utilize his expedited appeals process. Pursuant to this procedure, the claimant need not exhaust administrative remedies beyond the reconsideration stage

> "when the facts and [the Secretary's] interpretation of the law are not in dispute and when the only factor

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[19]See also *Wright* v. *Califano*, 603 F.2d 666, 667, 669 & n.9 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

> precluding an award of benefits is a statutory provision which the claimant challenges as unconstitutional . . . ."

Heckler v. Ringer, 104 S.Ct. 2013, 2017 n.2 (1984). The Secretary's decision to utilize the expedited appeals procedure was a concession that the only issue raised in this action is a constitutional one, beyond the scope of his powers to address. See, *e.g.*, *Wiesenfeld*, 420 U.S. at 641 n.8. That recognition is applicable both to the named plaintiffs and to the plaintiff class.[20]

The Secretary argues that individual class members may present other factual issues which would be dispositive of their cases. In this Court, he speculates that the duration of the marriage or the date of the remarriage might differ from that recognized by the parties. Sec.Br. 41. In the district court, he raised a variant of these hypotheticals, claiming that an applicant might change her mind as to whether there had actually been a remarriage. J.S. App. 17a n.4. The district court dismissed this possibility as "speculative and unlikely." *Ibid.*

More important, however, is that the class only includes individuals who "would be eligible for benefits *but for the operation of the remarriage rule*. The facts of their claims are not in dispute. . . ." J.S. App. 17a (footnote omitted; emphasis added). The alleged factual issues

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[20]Like § 405(g) itself, the Secretary's regulations are written in terms of individual claimants and do not address classes or how principles articulated in terms of individuals are to be applied to classes. Thus, when the Secretary published the regulation governing expedited appeals, no mention was made of its relevance to class actions. 40 Fed.Reg. 53385 *et seq.* (1975). This Court has recognized, however, that use of the singular in § 405(g) is not relevant to the propriety of class certification. *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979).

raised by the Secretary in this Court have already been eliminated as grounds for the denial of benefits.

The Secretary's concession in this case is more formal and specific than the events on which this Court relied in *Salfi*, *Diaz*, and *Goldfarb* to conclude that the Secretary had waived exhaustion. In *Salfi*, the Court interpreted his failure to challenge the complaint's allegations on exhaustion as a statement of finality. In *Diaz*, despite the Secretary's motion to dismiss, the Court extrapolated from his oral admission that the decisions should be treated as final. In *Goldfarb*, the Secretary's reliance on the challenged provision, in the initial notice, was a sufficient basis to construe finality. In each case, this Court interpreted the Secretary's action to determine whether he had in fact waived exhaustion.

Applying that logic here produces the same result. Despite the Secretary's protestations, he has stated from the first[21] that the appellees failed to satisfy the terms of the statute and that the sole issue is the constitutionality of the challenged provisions. Further, he concedes that the district court "properly exercised jurisdiction . . . and reached the merits of the constitutional question" with regard to the claims of the named plaintiffs. Sec.Br. 33. Given these acknowledgements, the Secretary's waiver should be interpreted as applicable to all other similarly situated individuals. To do otherwise would be to ignore "the intensely 'practical' approach which the Court has

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[21]In the appellees' initial decisions, the Secretary relied on their inability to comply with the statute (*i.e.*, they had remarried) as the basis for denial. See B.R. 7, 12; K.R. 15, 31, 48. Each class member, by definition, received a similar denial.

adopted" in the exhaustion area. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (citation omitted).[22]

B. The district court properly held that the 60-day period in §405(g) is a statute of limitations and that, in the circumstances of this case, the class should not be defined by reference to the date on which the complaint was filed

1. This Court has twice held that the 60-day period in § 405(g) is "a statute of limitations," and, accordingly, is "waivable by the parties." *Salfi*, 422 U.S. at 764; *Eldridge*, 424 U.S. at 328 n.9. This position is generally recognized and followed by the Courts of Appeals.[23] Even

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[22]The district court's alternative analysis was also correct: "[I]n the circumstances of this case, the exhaustion requirement may be waived by the Court." J.S. App. 18a. A court may determine that "a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate." *Mathews v. Eldridge, supra*, 424 U.S. at 330. As this Court indicated in *Eldridge*, the rationale for judicial waiver of exhaustion derives from the principles articulated in *Salfi* for waiver by the Secretary. Waiver is thus appropriate where "[i]t is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context." *Ibid.* In this situation, it is impossible, not merely unlikely, that the Secretary would alter the controlling requirement, so that the same logic applies. The district court correctly followed that commonsensical analysis. J.S. App. 18a-19a.

[23]See, e.g., *City of New York v. Heckler*, 742 F.2d 729, 737 (2d Cir. 1984), cert. granted, No. 84-1923 (Oct. 7, 1985); *Jimenez v. Weinberger*, 523 F.2d 689, 696-697 (7th Cir. 1975), cert. denied *sub nom. Mathews v. Jimenez*, 427 U.S. 912 (1976); *Wright v. Califano*, 603 F.2d 666, 669 n.8 (7th Cir. 1979), cert. denied, 447 U.S. 911 (1980); *Johnson v. Heckler*, 769 F.2d 1202, 1209, rehearing denied, 776 F.2d 166 (7th Cir. 1985); *Mental Health*

(Continued on following page)

the two circuits which have described the 60-day period as "jurisdictional" have identified circumstances where it is not applicable.[24]

The district court held that the 60-day limitation, "like all statutes of limitations, . . . is subject to tolling." J.S. App. 21a. Thus, it is "tolled for at least 60 days, prior to the filing of Mrs. Owens' complaint in this action." J.S. App. 21a. The Secretary does not challenge this application of tolling. See *Heckler v. Lopez*, 104 S.Ct. 221, 224 n. 4 (1983) (Stevens, J., dissenting in part). The district judge also held that the 60-day period may be tolled where "the filing of a single administrative complaint gives the defendant adequate notice of the nature of the claim and opportunity to evaluate the effects of the claim on all similarly situated persons." *Id.* at 22a. The court found that Mrs. Owens' request for reconsideration provided the Secretary with notice of the constitutional claim, so that the 60-day period was tolled as of the date of the reconsideration request. *Ibid.*

The Secretary does object to tolling the statute at this earlier date, however, contending that the 60-day language establishes an absolute prohibition against a court exercising jurisdiction where there has not been literal compliance. In the district court (but not on appeal), the

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Association of Minnesota v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983); *Lopez* v. *Heckler*, 725 F.2d 1489, 1508 (9th Cir.), vacated on other grounds, 105 S.Ct. 583 (1984); *Hatchell* v. *Heckler*, 708 F.2d 578, 580 n.1 (11th Cir. 1983). But see *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985), petition for cert. pending, No. 85-474; *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982).

[24]*Parker* v. *Califano*, 644 F.2d 1199 (6th Cir. 1981); *Shrader* v. *Harris*, 631 F.2d 297 (4th Cir. 1980).

Secretary argued with equal vigor that §405(g)'s venue requirement is "jurisdictional," therefore barring certification of a class which included members who resided outside the Central District of California. See J.S. App. 22a. The district court properly rejected this argument, relying on the same discussion in *Salfi* in which this Court concluded that both the 60-day rule and the venue requirement were not jurisdictional. 422 U.S. at 764. It also pointed to *Califano v. Yamasaki*, 442 U.S. 682, 698-704 (1979) (see J.S. App. 22a-23a), which approved of nationwide class actions under §405(g) and thus repudiated strict adherence to the language of the venue provision.

This Court has thus declined to employ a literal reading of either the exhaustion requirement, see *Salfi*, 422 U.S. at 765, or the venue rule. Just as these aspects of §405(g) need not be slavishly followed in every context, so too must the 60-day rule be interpreted and applied in a manner commensurate with the statutory scheme and the particular circumstances: "the sense of the statute" must control, so that the Court may move "towards the commonsense view. . . ." *Heckler v. Edwards*, 104 S.Ct. 1532, 1538 (1984). Where the issue is class membership, it is especially appropriate not to apply meaningless criteria, for the only result will be artificial restrictions on those who may obtain relief. If, as it appears, "class relief for claims such as those presented . . . in this case is peculiarly appropriate," *Yamasaki*, 442 U.S. at 701, then the Court should analyze the 60-day rule with the same deference to practicality which it has employed with the exhaustion and venue requirements.

Furthermore, while the "sparse" legislative history indicates that §405(g) was written to address "run-of-the

mill'' claims,[25] this Court has recognized that Congress never intended the preclusion of broader, more flexible review. Thus, in *Yamasaki*, the Court rejected the Secretary's contention that the appellate courts which had held that class relief was available under §405(g) ''evinced insufficient respect for the statute's plain language. . . .'' 442 U.S. at 699. Instead, it observed that §405(g) presented no special considerations, for the provision

> ''contains no express limitation of class relief. It prescribes that judicial review shall be by the usual type of 'civil action' brought routinely in district court in connection with the array of civil litigation.''

Id. at 699-700.

The Court likewise held that §405(g) was no bar to injunctive relief. Calling the ''Secretary's reading of the statute . . . too grudging,'' it concluded that nothing in the language or legislative history of §405(g) precluded injunctive relief: ''Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.'' *Yamasaki*, 442 U.S. at 705.

Similarly, in *Salfi*, while observing that §405(g) ''prescribes typical requirements for review of matters before an administrative agency,'' 422 U.S. at 757-758 (footnote omitted), the Court held that it should be read broadly to permit review of constitutional challenges, which the Secretary is incompetent to handle. In reaching this conclusion, the Court focused on the importance of providing

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[25] *Yamasaki*, 442 U.S. at 699 n.13; *Salfi*, 422 U.S. at 792 n.8 (Brennan, J., dissenting); see also *Kennedy v. Harris*, 87 F.R.D. 372, 376-377 (S.D.Cal. 1980).

an adequate judicial forum for the consideration of constitutional claims. *Id.* at 762; see also *Califano v. Sanders*, 430 U.S. 99, 109 (1977).

The district court's ruling is also consistent with the language of §405(g), which expressly authorizes the Secretary to waive the time limit for filing an action in federal court. The claimant obtains review "by a civil action commenced within sixty days after the mailing to him of notice of such decision *or within such further time as the Secretary may allow.*" 42 U.S.C. §405(g) (emphasis added). The italicized phrase demonstrates Congress' intent that the limitations period should be applied with sufficient flexibility to allow for equitable considerations.[26]

Section 405(g) has thus been interpreted to accommodate both the simple, individual case and also class-wide challenges. Since this Court recognizes that common principles of equity and civil procedure are applicable in the §405(g) context, the 60-day limitation must be subject to a court's equitable power to toll or waive.

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[26]The regulations fleshing out this provision reflect the flexibility inherent in the 60-day rule. The Secretary lists factors which are considered in determining whether the individual "had good cause for missing the deadline," so that "the time period will be extended." 20 C.F.R. § 404.982; see also *id.*, § 404.911(a). "Examples of circumstances where good cause may exist" include "[u]nusual or unavoidable circumstances . . . which show that you could not have known of the need to file timely. . . ." 20 C.F.R. § 404.911(b)(9). The average claimant, faced with a decision stating that the statute does not authorize benefits for people in her circumstances (e.g., she has remarried), would not reasonably assume that she should act within sixty days. In a case of constitutional proportions, it is unlikely that most people would even discover the existence of a potential claim within sixty days.

2. A statutory time limit does "not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 559 (1974). Thus, when reviewing statutes of limitations, this Court has analyzed the limitation in light of the purposes underlying the overall statutory scheme.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), it rejected the argument that the time limit for filing a charge under Title VII of the Civil Rights Act of 1964 was a jurisdictional prerequisite to filing suit in district court. The Court noted that one Senator had characterized the filing rule as a "period of limitations," and another "described its purpose as preventing the pressing of 'stale' claims, . . . the end served by a statute of limitations." *Id.* at 394. In light of the similar nature of §405(g), this analysis is especially significant:

> "Declining to read literally another filing provision of Title VII, we explained that *a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'* "

Id. at 397 (citation omitted; emphasis added). By holding that the filing rule was "subject to waiver as well as tolling when equity so requires," the Court "honor[ed] the remedial purpose of the legislation as a whole without negating the particular purpose of the filing requirement, to give prompt notice to the employer." *Id.* at 398.[27]

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[27]See also *Baldwin County Welcome Center v. Brown*, 104 S.Ct. 1723, 1725-1726 & n.6 (1984) and *id.* at 1731 (Stevens, J., dissenting) (90-day rule for filing under Title VII is statute of limitations so that filing and waiver would be applicable in appropriate circumstances).

Similarly, in *Honda v. Clark*, 386 U.S. 484 (1967), the Court held that a 60-day limitation for seeking judicial review of the Attorney General's decision under the Trading with the Enemy Act was a statute of limitations subject to equitable tolling. The statute was tolled during the pendency of litigation filed by other individuals who were not parties to the *Honda* case. The Court expressly relied on the Act's remedial purpose ("to provide a method for the fair and equitable distribution of vested enemy assets to American residents") as the basis for an observation particularly appropriate to the instant case: "The 60-day limitation on suits was designed to further this end—to aid claimants by expediting a final distribution—and *not primarily as a shield for the Government.*" *Id.* at 495-496 (emphasis added).

The similar remedial purposes of the Social Security Act have long been recognized: "The hope behind this statute is to save men and women from the rigors of the poor house as well as from the haunting fear that such a lot awaits them when journey's end is near." *Helvering v. Davis*, 301 U.S. 619, 641 (1937); see also *Flemming v. Nestor*, 363 U.S. 603, 610 (1960); *Social Security Board v. Nierotko*, 327 U.S. 358, 364 (1946). But many Social Security beneficiaries and applicants are ill-suited to recognize and protect their rights under the Act.[28] The Secretary

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[28]See, e.g., *Heckler* v. *Campbell*, 103 S.Ct. 1952, 1961 (1983) (Marshall, J., concurring in part, dissenting in part); *City of New York* v. *Heckler*, *supra*, 742 F.2d at 738; *Tierney* v. *Schweiker*, 718 F.2d 449, 455-456 (D.C.Cir. 1983); *Penner* v. *Schweiker*, 701 F.2d 256, 261 (3d Cir. 1983); *Parker* v. *Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981); *Gray Panthers* v. *Schweiker*, 652 F.2d 146, 169 (D.C.Cir. 1980).

himself, in reference to the Supplemental Security Income (SSI) program, has expressly observed the relatively low educational level of most recipients. 46 Fed. Reg. 42337, 42338 (1981).[29] Thus, as in *Zipes*, when the Secretary has been notified of the claim and the plaintiff represents a class of individuals who, without the assistance of counsel, are unlikely to recognize the existence of a constitutional issue in the denial of their applications, the statute of limitations should be applied flexibly in order to accommodate the interests of both the Secretary and the Act's intended beneficiaries.

In cases where the only issue is the constitutionality of the statute and the Secretary's basis for denial of benefits is the conflict between the recognized facts and the statute itself, principles of equity and common sense require a practical approach to the question of class certification. Without such an approach, class certification in a constitutional challenge to the Social Security Act will frequently be precluded. When the Secretary's policy of "nonacquiescence" is added to the equation, the inevitable result is that only named plaintiffs will obtain relief from a constitutional deprivation, a harm which exists separately and independently from any economic injury. *Heckler v. Mathews*, 104 S.Ct. 1387, 1395 (1984); see also J.S. App. 26a. For § 405(g) to have any practical import

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[29]While the instant case addresses an issue in the insurance program, § 405(g) is also applicable to claims under SSI (see 42 U.S.C. § 1383(c)(3)), the means-tested program which provides benefits to low income aged, blind, and disabled individuals. 42 U.S.C. § 1381 *et seq.* Because of the low amount of their benefits, many Social Security recipients are also eligible to receive an SSI payment.

in constitutional challenges, it must be interpreted realistically to permit those harmed to obtain redress. The district court's focus on the reconsideration decision effected this goal, and it should therefore be upheld.[30]

CONCLUSION

The judgment of the district court should be affirmed on the merits. On the issue of class certification, the Secretary's appeal should be rejected, with the judgment affirmed to the effect that the class definition was not inconsistent with 42 U.S.C. § 405(g).

Respectfully submitted,

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January, 1986

[30]This Court has taken no action on appellees' cross-appeal, which seeks to define the class more broadly than did the district court. See *Owens* v. *Heckler*, No. 85-31 (docketed July 5, 1985), at 10-12. By arguing in the instant appeal that the district court's order of class certification does not conflict with § 405(g), appellees do not foreclose their right, at the appropriate time and in the appropriate forum, to contest the class definition as too restrictive. That issue, however, is not before the Court on this appeal.

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No. 84-1905

In the Supreme Court of the United States

OCTOBER TERM, 1985

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

BUENTA M. OWENS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANT

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I.

We have demonstrated in our opening brief that the distinction Congress drew, during the years from 1979 through 1983, between widowed spouses and divorced spouses with respect to their eligibility for secondary Social Security benefits upon remarriage was plainly rational. From the time that Congress first provided for secondary benefits in 1939, it has treated spouses who remained married differently from those who divorced. This Court unanimously sustained the constitutionality of that distinction in *Mathews* v. *De Castro*, 429 U.S. 181 (1976), concluding that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married" (*id.* at 188). It was not "patently arbitrary" (*Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960)) for

Congress to invoke that distinction in 1977 for purposes of determining continued eligibility for survivor's benefits upon remarriage. Appellees' contrary submission is without merit.

A. Appellees first maintain (Br. 15-20) that the Court should subject the statutory classification to heightened scrutiny. However, as the district court recognized (J.S. App. 37a), this Court already has held that classifications based on divorced status must be sustained if they satisfy the rational basis test. *De Castro,* 429 U.S. at 185, 188-189.

1. Appellees nevertheless argue that "more demanding scrutiny" is required because the legislative history of the 1977 amendments does not sufficiently identify Congress's reasons for declining to extend survivor's benefits to divorced spouses who remarry. Br. 16-17, quoting *Schweiker* v. *Wilson,* 450 U.S. 221, 243-245 (1981) (Powell, J., dissenting). But "[w]here, as here, there are plausible reasons for Congress' action, [the Court's] inquiry is at an end. It is, of course, 'constitutionally irrelevant whether [those reasons] in fact underlay the legislative decision,' *Flemming* v. *Nestor,* 363 U.S. at 612, because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 179 (1980). In any event, this is not a case in which Congress's purposes must be left to speculation. They are "implicit in the statutory scheme itself" (*Schweiker* v. *Wilson,* 450 U.S. at 244 (Powell, J., dissenting)), in light of the established pattern under the Social Security Act of treating divorced spouses differently from couples who remained married. Moreover, just one year before Congress enacted the 1977 amendments, this Court held in *De Castro* that there is a rational basis for concluding that divorced spouses depend less on each other than do spouses who remain married. It was not necessary for Congress to reiterate that rationale in 1977.

2. Appellees next argue (Br. 18) that heightened scrutiny is appropriate because "the government relies on policy, not fiscal arguments." As we explain below (see page 7, *infra*), there is no basis for appellees' assertion (Br. 18, 28-29) that fiscal concerns did not underlie Congress's decision in 1977 not to extend secondary benefits to divorced spouses who remarried. Moreover, in *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974), the only authority appellees cite for the novel distinction between "fiscal" and "policy" goals (see Br. 18, 29), the Court simply held that the allocation of scarce resources was *not* the purpose of the exclusion of illegimate children (417 U.S. at 633-634). The Court did not suggest that a "fiscal" purpose would have been subject to a lesser degree of scrutiny than the purported "policy" of preventing spurious claims. Appellees' argument also confuses the general purpose of allocating scarce resources to best effectuate the goals of the Social Security program with the praetical decision of how to define eligibility in order to accomplish that goal. The latter decision, made in furtherance of the discretion "to spend money to improve the general public welfare in one way and not another, * * * 'belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' " *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937).

3. Finally, appellees contend (Br. 18-20, 31, 33) that heightened scrutiny is required because the classification is based on the view that "divorced women are less worthy individuals" (Br. 20) and reflects "archaic prejudices against divorced women" (Br. 33). This assertion cannot be squared with appellees' concession (Mot. to Dis. or Aff. 15) that Congress properly could have declined to extend secondary benefits to *any* divorced spouses. Nor did this Court in *De Castro* intimate any such view of distinctions based on

divorce.[1] As appellees appear to concede, the legislative history contains no evidence of congressional hostility toward divorced women. To the contrary, Congress extended secondary benefits to divorced women in 1965 because of its particular concern for women who had not worked and who might not have the opportunity to earn Social Security protection after their divorce. Similarly, Congress deleted the support requirement in 1972 because of a concern that it had proven to be an unfair barrier for some divorced women. Gov't Br. 25-27; *Califano* v. *Boles*, 443 U.S. 282, 291-292 & n.9 (1979). And of course Congress amended the Act in 1983 to permit the payment of benefits to divorced spouses who remarry after age 60. Gov't Br. 7. Congress's sympathetic response to the needs of divorced men and women fatally undermines appellees' argument for heightened scrutiny. *City of Cleburne* v. *Cleburne Living Center, Inc.*, No. 84-468 (July 1, 1985), slip op. 9-13.

B. Applying the rational basis test, appellees first attempt (Br. 21-24), to avoid the controlling force of this Court's decisions in *De Castro* and *Califano* v. *Jobst*, 434 U.S. 47 (1977). In *Jobst*, the Court upheld as "unquestionably valid" the general rule under the Social Security Act that secondary benefits are automatically terminated upon marriage. 434 U.S. at 54. The ineligibility of appellees to receive survivor's benefits prior to 1984 was but a particular application of that general rule. Appellees' only complaint is that another category of secondary beneficiaries—widowed spouses—were permitted to retain their full eligibility for secondary benefits upon remarriage after age 60. But as the

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[1]Appellees point out (Br. 20 n.8) that the challenged exclusion of divorced spouses who remarried primarily affected women. But as appellees concede (Br. 2 n.1, 20 n.8), the overwhelming majority of *widowed* spouses who received secondary benefits also were women. There accordingly is no basis for inferring that the differing treatment of the two categories was motivated by any animus against women.

Court observed in *Jobst*, "[e]ven if it might have been wiser to take a larger step [in eliminating the marriage rule], the step Congress did take was in the right direction and had no adverse impact on persons like [appellees]." 434 U.S. at 57-58.

Appellees in fact concede the validity of the general marriage rule. But they insist (Br. 24) that Congress did not have a rational basis for excluding divorced spouses from the exception it fashioned for widowed spouses who remarry after age 60. In their view, *De Castro* should be confined to its particular facts, which concerned provisions for the payment of benefits to a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a divorced woman in similar circumstances. Contrary to appellees' contention, *De Castro* does not rest on narrow premises unique to the particular statutory provisions involved. The Court reasoned broadly that "[d]ivorce by its nature works a drastic change in the economic and personal relationship between a husband and wife" and that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." 429 U.S. at 188. See also *Boles*, 443 U.S. at 289-293. That reasoning applies equally here.

Appellees attempt to distinguish *De Castro* on the ground that the exclusion of divorced spouses at issue here was inconsistent with the congressional purpose of extending secondary benefits to widowed spouses who remarry after age 60, which was to eliminate the disincentive to marry. See Br. 22, 32-33. The difficulty with appellees' argument is that a complete effectuation of that congressional purpose would have required elimination of the marriage rule not only for divorced spouses over age 60, as

appellees urge, but for *all* unmarried secondary beneficiaries. Yet in *Jobst,* the Court specifically rejected the notion that the creation of limited exceptions to the general marriage rule required Congress to "entirely repudiate marriage as a terminating event" (434 U.S. at 58).

C. Although appellees previously argued that widowed and divorced spouses "were accorded identical treatment prior to remarriage" (Mot. to Dis. or Aff. 14)—and although the district court's constitutional holding rested on similar premises (J.S. App. 34a-35a, 39a-40a, 42a)—appellees now concede (Br. 25-26) that Congress consistently has distinguished between widowed and divorced spouses with respect to both their initial eligibility for benefits and their continued eligibility upon remarriage. But appellees argue (Br. 26-27) that Congress could not rationally distinguish between these two categories upon remarriage because Congress determined that they had the same degree of dependency upon the wage earner at the time of his death and thereafter were indistinguishable in all "relevant" respects. Appellees have failed to cite *any* evidence of a congressional finding in 1977 that widowed and divorced spouses were equally dependent upon the resources of the wage earner, and the decision in *De Castro,* rendered only a year earlier, rested on a contrary premise.

Thus, the most reasonable explanation is that Congress determined only that the limited category of divorced women to whom it extended wife's and widow's benefits were likely to have been sufficiently dependent upon their former husbands to warrant treating them similarly to widowed spouses for purposes of initial eligibility. Congress reasonably could decide to give effect to the residual differences between these two categories when the divorced wife remarried, concluding that the degree of dependence on the wage earner's resources that had justified extending secondary benefits to certain divorced wives in the first place (see

page 4, *supra*) was sufficiently attentuated by remarriage to warrant termination of eligibility. That action also had the effect of preventing the drain on the trust fund where a divorced wife and widow both receive benefits on the same wage earner's account (see Gov't Br. 31)—a rational basis for Congress's action that appellees do not even mention.

In addition, even the district court, unlike appellees (Br. 28-29), recognized that fiscal concerns led Congress to reject the complete elimination of the marriage rule (applicable to widowed and divorced spouses, as well as other secondary beneficiaries, such as dependent parents and children) that was proposed by the House. As the district court explained, that "broad change" would have added 670,000 new beneficiaries to the rolls at a cost of $1.3 billion annually. J.S. App. 3a-4a, citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I, at 47-48 (1977), and *id.* Pt. II, at 73. It is not surprising that Congress took a more cautious approach by eliminating the marriage rule only for widowed spouses, for whom it previously had relaxed that rule in 1965. See Gov't Br. 5, 27. Contrary to appellees' assertion (Br. 28-29), the fact that elimination of the marriage rule for divorced spouses would have contributed less than $17 million to the $1.3 billion cost of a complete elimination of the rule does not suggest that Congress's failure to eliminate the rule for all secondary beneficiaries (including divorced spouses) was not based on fiscal concerns.

Appellees also take issue (Br. 29-30) with our argument (Gov't Br. 24-25) that Congress rationally could conclude that spouses who remained married until the time of the wage earner's death had a more substantial claim to benefits than did spouses who were divorced from the wage earner before his death. This conclusion follows, however, from the recognized purpose of the secondary benefits program to afford protection to the wage earner's family and to assure the wage earner that his family will be provided for.

Gov't Br. 22, 30. Divorce severs the family unit for which secondary benefits are intended, and the payment of benefits to the former spouse is not necessary in order to assure the wage earner that family members will be adequately protected. Although Congress nevertheless chose to extend wife's and widow's benefits to certain divorced spouses in 1965, it was not thereby estopped from terminating those benefits upon remarriage. It is common for alimony payments to terminate upon remarriage, and Congress rationally could adopt a parallel rule under the Social Security Act. Gov't Br. 31.[2]

II.

Appellees' argument (Br. 34-47) that the district court properly exercised jurisdiction over the claims of the unnamed class members is equally without merit. The pervasive theme of their argument is that the Court should take a "practical," non- "literal," and "flexible" approach, under which the failure of the unnamed class members to comply with the exhaustion and 60-day filing requirements in 42 U.S.C. 405(g) would be excused in order to permit appellees Buenta and Kenneth Owens to attack the constitutionality

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[2]Contrary to appellees' assertion (Br. 30 & n. 13), it is irrelevant for these purposes that only 14% of divorced women were actually receiving alimony in 1975. The point is that when alimony *is* awarded, payments typically cease upon remarriage. Appellees also err in contending (Br. 30-31) that the analogy to alimony is inapt because this case concerns divorced spouses whose former spouses have died—an event that independently terminates a divorced spouse's entitlement to alimony. In drawing this distinction, appellees presumably concede the constitutionality of the statutory provisions in effect prior to 1984 that terminated a divorced wife's entitlement if she remarried *before* the wage earner died. But if the rationality of that exclusion is conceded, it cannot have been irrational for Congress also to exclude divorced spouses who remarried *after* the wage earner died. In other words, Congress reasonably could conclude that surviving divorced spouses should be treated like other divorced spouses, rather than like widows and widowers.

of the statutory provisions on their behalf. See Br. 38-39, 41, 43 & n.26, 44-46. This Court repeatedly has made clear, however, that in order for a class to be properly certified in an action under 42 U.S.C. 405(g), each of its members must individually satisfy the requirements for judicial review under that section. *Califano* v. *Yamasaki*, 442 U.S. 682, 701, 704 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part).

Each of the unnamed class members in this case was personally informed that his claim had been denied and that he had 60 days within which to seek further review, but each then failed to exhaust his administrative remedies and seek judicial review. A court has no jurisdiction to order the Secretary to reopen a decision that the claimant has allowed to become final and binding against him before the filing of the class action in question. *Califano* v. *Sanders*, 430 U.S. 99, 108-109 (1977). And there is no suggestion that any unnamed class member ever requested either the Secretary or the court to reopen the decision denying his own claim for benefits. The district court instead ordered that reopening on a nationwide basis at the behest of the two named plaintiffs in this case, who were strangers to the administrative proceedings on the claims involved. Such judicial orders drastically disrupt the repose and orderly processing of claims that Congress and the Secretary have deemed essential to the efficient and fair administration of the Social Security Act. See *id.* at 108.

A. Appellees attempt to avoid the exhaustion default by arguing (Br. 34-37) that the Secretary waived exhaustion for the unnamed class members. Of course appellees do not suggest that the Secretary actually granted a waiver to each such class member. Instead, they argue that because the Secretary entered into a formal agreement with the named

plaintiffs, under which the parties stipulated that exhaustion through the Appeals Council stage would not be necessary, the Secretary should be deemed to have waived exhaustion for the unnamed class members as well. Appellees completely ignore the purpose of the regulations authorizing such waivers, which is to establish a procedure for dispensing with full exhaustion on an *individualized* basis where the Secretary has determined that there are no remaining questions of fact or law in connection with the particular claim and the claimant challenges the constitutionality of the governing statutory provision. The Secretary cannot make that determination on a class-wide basis, and he has not purported to do so here. Nor is there any indication that any unnamed class member ever expressed a desire to challenge the constitutionality of the relevant statutory provisions, which is a prerequisite to invoking the expedited appeals process.

Contrary to appellees' contention (Br. 34-37), the sweeping waiver rule they propose finds no support in *Salfi*, 422 U.S. at 766-767; *Diaz*, 426 U.S. at 72-73, 76-77; or *Califano* v. *Goldfarb*, 430 U.S. 199, 203 n.3 (1977). In those cases, the Court held that the Secretary had waived the exhaustion requirement with respect to a particular named plaintiff. Those narrow holdings do not support a finding of a waiver on a class-wide basis or suggest that an unnamed class member may circumvent the special procedures the Secretary has since established for granting a waiver of the exhaustion requirement where a claimant wishes to challenge the constitutionality of a provision of the Act.[3]

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[3]Contrary to appellees' contention (Br. 36), the Secretary's jurisdictional concession in *Goldfarb* was not made in administrative proceedings; it was made in the jurisdictional statement filed in this Court (at 4 n. 2). That jurisdictional statement stated that "[t]he Secretary is currently considering the promulgation of regulations that will specify the circumstances under which a decision denying benefits without a hearing will be treated as 'final' " (*ibid.*). The Secretary similarly informed

B. Appellees argument (Br. 39-47) that the unnamed class members also should be excused from their failure to comply with the 60-day filing period in 42 U.S.C. 405(g) rests entirely on their characterization of that provision as a "statute of limitations" that is "waivable by the parties" (Br. 39, quoting *Salfi*, 422 U.S. at 764, and *Mathews* v. *Eldridge*, 424 U.S. 319, 328 n.9 (1976)). This argument fails for several reasons. First, there has been no suggestion here that the Secretary has waived the 60-day filing requirement. Accordingly, even assuming that that requirement should be treated as an ordinary statute of limitations, this action is not timely as regards the unnamed class members who received a final decision of the Secretary more than 60 days before the complaint was filed. Second, it is irrelevant whether the 60-day requirement is labeled a "statute of limitations." Similar provisions have been referred to as statutes of limitation in the decisions of this Court holding that in a suit against the sovereign, such a limitation (i) is an explicit condition on Congress's waiver of sovereign immunity and the jurisdiction of the court, (ii) must be strictly construed, and (iii) is not subject to implied exceptions or tolling rules. See *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957); *Munro* v. *United States*, 303 U.S. 36,

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the Court of the contemplated regulations in the supplemental brief for the appellant (at 5 n.2) in *Diaz*. Those regulations were promulgated in ~~December~~ November 1975 (see Gov't Br. 38-40; 40 Fed. Reg. 53385), and it was pursuant to those regulations that the Secretary waived full exhaustion on the claims of appellees Buenta and Kenneth Owens (see Gov't Br. 10-11). The Court held in *Salfi* (422 U.S. at 766) that the Secretary may promulgate regulations pursuant to 42 U.S.C. 405(a) to specify when a decision will be regarded as "final" for purposes of 42 U.S.C. 405(g), and such regulations must be sustained unless they are arbitrary and capricious (*Heckler* v. *Campbell*, 461 U.S. 459, 466 (1983)). There has been no suggestion that the expedited appeal regulations are arbitrary and capricious.

40-41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887).[4]

For the foregoing reasons, appellees' reliance (Br. 44) on *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), and *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385 (1982), is misplaced. Those cases did not involve suits against the federal government to obtain money from the federal treasury. In the absence of express statutory language, judicially fashioned principles of waiver and tolling that ordinarily are applicable in suits against private parties are not incorporated into statutes imposing limitations on the time within which a suit may be brought against the federal government. *Soriano*, 352 U.S. at 275-276; *Munro*, 303 U.S. at 41; *Finn*, 123 U.S. at 233. There is no reason to believe that Congress intended a different result when it enacted 42 U.S.C. 405(g).[5] To the contrary, Congress explicitly provided a mechanism for the *Secretary* to extend the suit-filing period in appropriate circumstances. This express provision for the accommodation of equitable considerations makes it particularly clear that Congress did not authorize judicially fashioned principles of tolling and waiver.

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[4]Contrary to appellees' contention (Br. 40), the conclusion that a person who received a final decision of the Secretary within 60 days of the filing of this suit could properly be included in the class is not based on principles of tolling. For such a person, the class action complaint commences the civil action within 60 days of the final decision on his claim. Justice Stevens' recognition of this point in his partial dissent in *Heckler* v. *Lopez*, 464 U.S. 879, 883 n. 4 (1983), likewise did not rest on principles of tolling.

[5]Appellees' reliance (Br. 45) on *Honda* v. *Clark*, 386 U.S. 484 (1967), is misplaced for the same reason. There, the Court explicitly acknowledged the general rule that principles of waiver and tolling do not apply to statutes of limitations in suits against the federal government. *Id.* at 501. The Court held that those principles were inapplicable only because that case was not one in which "the public treasury was directly affected" (*ibid.*), but was instead a suit by a creditor to participate in the distribution of privately owned assets held by the Alien Property Custodian.

CONCLUSION

For the foregoing reasons and the additional reasons stated in our opening brief, it is respectfully submitted that the judgment of the district court should be reversed.

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